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ONTARIO LABOUR RELATIONS BOARD REPORTS

October 1992



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1992] OLRB REP. OCTOBER

EDITOR: RON LEBI

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



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0816-92-R; 3874-91-R Dirk Koehler, for the employees of the Cambridge Reporter, Applicant v. The Southern Ontario Newspaper Guild Unit, Cambridge, Ont. (Local 87), Respondent v. **Cambridge Reporter**, Intervener

Charges - Fraud - Reconsideration - Termination - Employee alleging that union obtained its certificate by fraud and that bargaining rights should be terminated - Board determining that certain allegations not contributing to *prima facie* case - Other allegations dismissed on basis of lack of particularity and delay - Reconsideration application and termination application dismissed

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members R. W. Pirrie and B. L. Armstrong.

APPEARANCES: Dirk Koehler, Sue Gage, S. Shannon Russel for the applicant; L. A. Richmond, P. Murdoch and F. Soboda for the respondent; F. G. Hamilton and Jim Carnaghan for the intervener.

DECISION OF THE BOARD; October 26, 1992

1. This is an application for termination and an application for reconsideration of the dismissal of an earlier application for termination. On July 16, 1992, a majority of the Board, Board Member Pirrie reserving, issued a brief decision dismissing both applications and stating that reasons would follow at a later date. These are our reasons.

2. It is appropriate to provide a brief history of the bargaining relationship between the respondent union and the intervener employer, the Cambridge Reporter. An interim certificate was issued by the Board on April 27, 1990. Due to disputes over the inclusion of editorial positions in the bargaining unit, a Board Officer was appointed to inquire into and report to the Board on their duties and responsibilities. The parties agreed to attempt to resolve those matters at the bargaining table and adjourned that portion of the dispute sine die in September, 1991. On July 31, 1992, the union asked that the editorial exclusion issues be relisted for hearing. Dates have now been set in October, 1992 to hear those matters. Bargaining took place between the parties between September 1990 and November 1991. When negotiations broke down, a strike commenced which lasted into February 1992. An application for first contract arbitration was filed in November 1991 and heard by the Board over a course of 12 days concluding on February 11, 1992. First contract arbitration was directed on February 21, 1992 by the Board (differently constituted). The reasons for that direction are reported as the *Cambridge Reporter*, [1992] OLRB Rep. March 271. Union counsel advised the Board that it had also carried certain section 91 complaints against the employer.

3. On March 30, 1992 an application for termination of bargaining rights was filed by the same applicant as in the present application under sections 57 and 58 of the Act. It was dismissed on the basis of section 41(23) of the *Labour Relations Act* which provides that an application for a declaration that a trade union no longer represents the employees in the bargaining unit after the Board has given a direction for first contract arbitration is of no effect unless it is brought after the first collective is settled. The Board found that the application was clearly untimely as it had been brought prior to the settlement of the first collective agreement by arbitration.

4. On June 12, 1992 the current application for termination was filed under section 59 which provides as follows:

59. If a trade union has obtained a certificate by fraud, the Board may at any time declare that

the trade union no longer represents the employees in the bargaining unit and, upon the making of such a declaration, the trade union is not entitled to claim any rights or privileges flowing from certification and, if it has made a collective agreement binding upon the employees in the bargaining unit, the collective agreement is void.

5. When this matter came on for hearing on July 15, 1992, Mr. Koehler, the applicant appeared unrepresented and requested an adjournment. This adjournment was opposed by the respondent union. The employer took no position on the request for an adjournment. The adjournment request was made on the basis that the applicants' lawyer of choice was on vacation and that it would be unfair to go ahead without him.

6. Before going on vacation, applicants' counsel had contacted union counsel to see if the union would consent to an adjournment. The union had initially agreed and entered into negotiations with the applicants' lawyer to find a mutually agreeable date for continuation. The mutually agreeable dates were apparently considered unacceptable by the applicants; their counsel wrote to the union on June 30, insisting on proceeding on July 15. The union had no advice prior to the morning of the hearing that the lawyer's clients intended to change course and ask for an adjournment. Having considered the submissions of the parties, the Board gave the following oral ruling at the hearing, denying the adjournment:

The Board's jurisprudence is clear that adjournments will not be granted for the convenience of counsel. This is ever more the case where the clear representation to the party opposite is an insistence on proceeding.

Adjournments are granted on consent or where circumstances truly beyond a party's control are at play. Consent is not present here. As the applicants could have engaged other counsel, we do not consider the circumstances of this case to have been beyond their control.

7. We then proceeded to hear the preliminary motion of the union. The union asked the Board not to entertain any of the allegations contained in the applications nor to entertain either of the applications on the following grounds:

1. The application does not disclose a *prima facie* case that would cause the Board to revoke the union certificate;
2. the allegations are untimely; all of them could have been discovered much earlier, up to 26 months earlier, and
3. despite a request for particulars, none has been forthcoming and therefore it is impossible to deal with the allegations.

The union submits that the matters pleaded therefore disclose no violation of the Act or any reason to revoke the certificate. A very brief summary of the arguments made follows.

8. Noting the lengthy litigation which has occurred between the parties, union counsel asks the Board to take account of the fact that it was only when the direction for arbitration of the first contract was handed down that the application for termination of bargaining rights was submitted. Further, he says that the current application is just an attempt to avoid the result of the dismissal of the previous application for termination. Counsel maintains there is no reason to undo either the certificate or the dismissal of the earlier application for termination. Union counsel detailed his reasons for stating that none of the allegations made out a *prima facie* case and were so devoid of particularity as to make a proper preparation impossible. He relies on Rule 72 and the Board's jurisprudence to ask the Board to dismiss the applications.

9. The applicant's response is that he intended to apply on the grounds of fraud by alleging lying and cheating in the first application for termination. Mr. Koehler says that because the first application was thrown out on a technicality, the Board should deal with all the matters now. Mr. Koehler says that the reason that the allegations were not made sooner is that the union is powerful and intimidating and a lot of the employees did not know what was going on; the allegations were always there but people did not know what to do about them. He says that during and after the strike people became more knowledgeable and fed up; the allegations only became known and solidified at the end of the strike. Further, he says that it has been a long process to get these allegations together and that more allegations will be forthcoming in the future. Mr. Koehler says that he represents the majority of the people in the bargaining unit and that this is as good a time as any for justice to occur. He said that the strike vote was illegal and that we should not allow a first contract to be settled by arbitration.

10. Mr. Koehler, who started working for the employer in November of 1990, several months after the union had been certified, complained that he had never been approached to sign a union card. Also, he says there were people who were there at the time of the organizing campaign who were not approached and were "steamrolled" into the union.

11. As to the question of particulars, Mr. Koehler says that the people involved were willing to have their names disclosed only if subpoenaed; the names would be disclosed on the date of hearing or immediately prior.

12. Referring to one of the applicants' allegations to the effect that persons who signed cards submitted by the union on the certification application had not paid a dollar (a non-pay allegation), employer counsel argued that the Board's process for dealing with non-pay allegations reflects the idea that "non-pays" cannot be subject to Rule 72. That is because of the requirement to keep membership evidence confidential unless the Board otherwise orders. Making reference to the Board's high reliance on the accuracy of the union's Declaration Concerning Membership Documents, Form 9, counsel argues Rule 72 has not been applied by the Board to non-pays, and there is no time constraint on when they can be brought to the Board. Mr. Hamilton submitted that the Board should ask for the names involved in the non-pay allegations made by the applicants to be given to the Board in secrecy.

13. On the issue of delay, employer counsel says that a person cannot benefit by its own misdeeds; if someone was stolen from a long time ago for example, the thief should not be able to rely on the length of time as a defence. Further, decisions of the Board often alter relationships that have been relied on by the parties for years. He notes the Board is often hearing evidence going back more than 24 months as it did on the hearings on the application for first contract arbitration involving these parties. Further, he submits there is no principle that binds the Board that a new person whose rights are affected cannot bring the matter to our attention. He took the position that whenever a non-pay comes to the attention of the Board the Board should look into it. Counsel notes that the collective rights of others are adversely affected if appropriate standards of membership evidence are not met.

14. We were referred to the following cases in argument by one or both counsel: *Detroit River Construction Ltd.*, 63 CLLC 1115, (OLRB), *General Crane Industries Ltd.*, [1975] OLRB Rep. Jan. 39; *CCH Canadian Ltd.*, [1977] OLRB Rep. June 351; *Cable Tech. Wire Co. Ltd.*, [1978] OLRB Rep. June 496, *229704 Contracting Ltd.*, [1971] OLRB Rep. June 337, *Alderbrook Industries Ltd.*, [1981] OLRB Rep. Oct. 1331, *Roytec Vinyl Company*, [1990] OLRB Rep. June 727, *N.J. Spivak Limited*, [1976] OLRB Rep. Dec. 857; *Easy Enterprises Inc.*, [1987] OLRB Rep. July 994; *Ontario Taxi Association 1688*, [1981] Sept. 1280.

Decision

15. We will deal first with the application for reconsideration of the previous application for termination. Although there is no right of appeal from a decision of the Board, section 106(1) gives the Board the discretion to reconsider and change any decision it makes. It does not do so often as it is important to labour relations that disputes, once resolved, can be put behind the parties. Practice Note No. 17 indicates in a general way the situations in which the Board has reconsidered decisions in the past. They can be summarized as situations in which a party proposes to call new, practically conclusive, evidence which could not have been obtained earlier with due diligence or wishes to make representations or objections which it had no opportunity to raise with the Board previously. In addition, important policy issues have led the Board to exercise its discretion to reconsider.

16. No grounds have been disclosed by the applicants which would cause us to reconsider the previous application. The main thrust of the submission is that the applicants intended to allege fraud in the earlier application by alleging lying and cheating, although they did not make reference to fraud or allege the facts alleged in the current application. The matters that Mr. Koehler raises now are ones that could have been raised at the time of the earlier application and were not. His submissions were that he knew of them by the end of the strike, which was February 27, 1992. These are not matters of public policy or other grounds such as have caused the Board on occasion to reopen a decided matter. The fact that the applicants are not content with the earlier decision of the Board is not adequate basis for reconsideration.

17. The following is a summary of the allegations made in support of the fresh application for termination before us, in approximate chronological order:

- (a) In early 1989, Carole Racine and Anne Watkins, referred to as union organizers and whose names appear on the list of employees, induced an unnamed employee to sign membership evidence by making false representations to the effect that her earnings would increase from \$350 to \$700 if she signed a union card and that the union would not call employees out on strike in the event it was certified. Subsequently, the union held a strike vote and went out on strike from November 6, 1991 until February 27, 1992.
- (b) Prior to April, 1990 unnamed employees were told by an unspecified source that various managerial people including an editor and city editor had signed union cards. Based on this allegedly false representation certain employees signed cards.
- (c) An unnamed employee was told by Carole Racine on an unspecified date that if he signed a union card he would receive the same wage rate as at the Brantford Expositor, which was said to have an average wage of \$900 per week.
- (d) The same unnamed employee as in paragraph (c) above was told he would receive information on the progress of the organizing campaign and be invited to meetings. Having signed the union card, the union withheld information and correspondence from him in the belief that he was not loyal to the union cause.
- (e) Throughout the course of the organizing campaign employees who

were perceived by the respondent as having loyalties to management were denied access to information in order to make a decision.

- (f) Certain unnamed employees were falsely told by unspecified sources at unspecified times that in order to get information about the union, they had to sign a card.
- (g) During the course of the organizing campaign a party was held where free alcohol was provided to prospective members by the union. An unnamed employee who wished to obtain more information about the union's position on a strike was denied that information by an unnamed individual and signed a union card at the meeting. Subsequently, the employee continued to complain that he got no information from the union about negotiation rules and was not invited to any union meetings.
- (h) Unnamed employees did not pay a dollar when they signed their cards and these cards were filed by the union to obtain certification. This situation was first discovered by the applicant in the course of preparing the petition and application for termination in February and March 1992.
- (i) During the strike, unnamed employees, including the one referred to in paragraph (g), were subjected to property damage, vandalism, threatening phone calls, personal threats and surveillance by union representatives. Some were subjected to verbal abuse for crossing picket lines.

18. Based on the above allegations the applicant states that the union obtained its certificate by fraud, by reason of making false representations knowingly or without belief in their truth or falsely or recklessly as to whether they were true or not, and therefore their bargaining rights should be terminated, pursuant to section 59 [formerly section 58], set out above.

19. All of the allegations relating to strike misconduct (paragraph (i) above) can have no bearing on the assertion that the certificate was obtained by fraud, since they occurred well after the certificate was obtained and that portion of the application was dismissed for that reason on the basis that they made out no *prima facie* case.

20. The allegations relating to provision of information in paragraphs (d), (e) and (g) above do not contribute to a *prima facie* case for the relief sought. There are no specific obligations on a union as to whom to approach or what information to provide during an organizing campaign. See *Roytec Vinyl, supra*, at paragraphs 20 and 21.

21. We have determined that it is unnecessary to determine finally if the other allegations set out above amount to a *prima facie* case given our conclusions set out below. However, we would note that there is no allegation that the union or its officers made any of the allegedly false or fraudulent statements set out above. Thus this is not to be taken as a finding that there is a *prima facie* case made out on these facts.

22. The remaining allegations relate to the collection of membership evidence. We dismissed these on two bases: lack of particularity and delay.

23. Rule 72 provides as follows:

72.(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

- (a) include in the application or complaint; or
- (b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

24. Section 8 of the Statutory Powers Procedure Act provides as follows:

Where the good character, propriety of conduct or competence of a party is an issue in any proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

25. Union counsel asked the applicants for particulars by letter dated June, 25, 1992. Applicants' counsel wrote to Mr. Koehler on June 26, 1992 asking him to supply the particulars so that he could forward them to union counsel. Mr. Koehler did not do so, and took the position at the hearing of this matter that he would supply them on the hearing date, presumably referring to some future hearing date, since he did not provide them on the hearing date scheduled before us. Section 8 of the *Statutory Powers Procedures Act* is specific that reasonable information is to be provided prior to the hearing.

26. As the allegations presently stand, they are devoid of reference to dates except of the most general kind, such as "prior to April of 1990" and material facts such as the names of the people involved in the majority of the allegations which would be necessary to allow the union to identify the conversations said to constitute fraud. The reason given for this is that the people involved did not want their identities disclosed until the last possible minute. We did not find that this was sufficient reason to allow the applicants to proceed to call evidence of the many material facts absent from their complaint. If it were sufficient reason, it would be an exception to Rule 72

which could soon swallow the rule. As is clear from the Board's jurisprudence, the purpose of Rule 72 is to avoid embarrassment and delay by allowing a party to prepare for the case and make decisions about it with adequate information about it. This was not afforded by the applicants in this case. Although the Board has the discretion to allow the calling of such evidence on conditions, there were not sufficient reasons put forward to lead us to exercise that discretion in this case.

27. Even if the matters had been sufficiently particularized, we are of the view that the amount of time which has passed since the events complained of, would lead us to refuse to grant the relief sought, which is the exercise of the discretion given us by section 59 to terminate bargaining rights where the union obtained a certificate by fraud.

28. There are no specific applicable time lines in the Act. However, Rule 72 of the Board's Rules, in line with general principles of fairness, imposes an obligation to act with reasonable promptness. Fraud is an allegation of wrong doing and there is no exception from the application of rule 72 for it. The Board explained the balancing involved in *Roytec Vinyl, supra*, as follows (after having referred to the Board's usual process of screening non-pay allegations which are often considered to be allegations of fraud.)

25. Although the Board has formulated this specialized approach to non-pay and non-sign allegations, we reject the employer's argument that they are so unique that Rule 72 does not apply to them at all. It cannot seriously be argued that an allegation, for example, of forging signatures on membership cards does not amount to "improper or irregular conduct" within the meaning of Rule 72, and the purposes of the rule in preventing delay, prejudice and disruption and ensuring natural justice, are as cogent with respect to these allegations as with any other. The difference is that because of the importance of membership evidence in the certification process, the Board in its discretion under Rule 72 has traditionally struck a balance in non-pay and non-sign cases in which the reliability of the membership evidence has often taken precedence over other interests.

26. In this case, we had some serious concerns about the manner in which the second set of allegations was raised. It appeared that at least one of the petitioners, who was the source of the allegations, had been in possession of the relevant information for approximately four months before they were raised. For approximately three of those months, he was represented by counsel. Again, no mention was made of these allegations when the Board reviewed the outstanding issues and they were only raised when it appeared that the petitions were not numerically relevant.

27. On the other hand, it appeared that the employer had only become aware of the information in the allegations the day before they were made, and because certain hearing days had been adjourned at the request of the parties, the allegations were made at a relatively early point in the case. As the next hearing day had been assigned some six weeks later to accommodate the parties' schedules, it appeared that it would be possible to receive the particulars, screen them and subpoena any necessary witnesses in the interim. In other words, by an accident of scheduling, any delay or disruption could be minimized at that point. In addition, the screening process would provide at least some degree of protection against vexatious allegations. Having regard to the Board's jurisprudence in this area and the specific circumstances of this case, a majority of the Board dismissed the union's objections. We did not, however, preclude the very real possibility that the Board might decide differently in other circumstances where delay and prejudice could not be minimized in this fashion.

29. Employer counsel is quite correct that the principles of confidentiality as to membership evidence have led the Board to handle the provision of the name on the disputed card differently than the provision of other particulars. They are provided directly to the Board in the first instance, and then to the parties if the Board's investigation suggests that there is cause to proceed to a hearing on the matter. However, this does not address the question of the applicability of the

timeliness aspect of Rule 72. On the case before us, for well over two years, the names on the disputed cards were provided to no one; more importantly, the issue was never mentioned.

30. The now well accepted principle that delay produces particularly deleterious effects in labour relations has been elaborated by the Board in jurisprudence relating to a number of areas. These include cases where Rule 72 has been invoked, as well as cases involving the Board's discretion under section 91 as to whether to inquire into a complaint and the exercise of the Board's remedial powers in areas as different as applications under s. 1(4) and unfair labour practices. The considerations in each of these areas necessarily vary according to the provisions of the statute and the factual context. However, the common thread running through these disparate areas is the conviction that expedition is particularly crucial in the area of labour relations. This is partly because we are dealing with ongoing collective relationships which involve the daily reliance on the finality of previous litigation such as certification proceedings.

31. These principles were expressed in the *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, in the context of a section 91 complaint, as follows:

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship - quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

32. With few exceptions that measure of time - months rather than years - has been followed when the issue is raised. In the context of ruling on new allegations of wrong doing under Rule 72, a few weeks, or even days, of delay without good reason has lead the Board to refuse to entertain the allegations. In arbitral jurisprudence, because of similar labour relations considerations, unreasonable delay in the order of months has been held to be a bar to relief which would otherwise be available. See among others, *Re Oil and Chemical and Atomic Workers and Dow Chemical of Canada Limited*, (1966) 18 L.A.C. 51 and *Re. Clements and the Crown in Right of Ontario* (LLBO) (1981) 28 L.A.C. (2d) 288.

33. Here we are dealing with a delay of over two years and two months for the allegations which date from shortly before the application for certification. The allegations from "early 1989" are over 3 years old. Indeed, there is no indication that any cards signed in 1989 were submitted by the union. During this period of time, as set out above, the parties have been involved in bargain-

ing, lengthy litigation of various kinds, including a previous application for termination, and a protracted labour dispute. At none of these various opportunities or at any time in between did anyone seek to raise any of the issues raised by the applicants.

34. The reasons given by the applicants for not raising these matters earlier do not relate to their inaccessibility of discovery with reasonable inquiry. They appear to be related to the level of discontent engendered by the strike, the first contract direction and the dismissal of the earlier application for termination. Before this, anyone who may have had knowledge of the alleged facts did not choose to raise them. These are not the kinds of reasons for delay which have led the Board to overlook delays of the magnitude involved here.

35. Mr. Koehler seeks to rely in part on the fact that he was not in the employ of the Cambridge Reporter at the time of the certification application. This cannot assist the applicants. To find that a person who had no legal interest in the matter at the time it was litigated can at whatever time in the future question the foundation of the relationship, simply because he was not there at the time, would render meaningless the principles of finality so important to any adjudication system. In any event, he has been in the employ of the intervener since November, 1990, more than a year and a half before any of these matters were raised. He could have raised the facts raised here three months earlier in his previous application for termination, by which time he personally knew of them, but did not. *Res judicata* as a technical defence was not argued before us. Nonetheless, issues about the finality of the litigation of both the certification application and the previously dismissed termination application are of concern and were raised by the union in the form of the argument that the new application for termination is just a manoeuvre to avoid the dismissal of the earlier one.

36. Although employer counsel is correct that the Board is sometimes in a position of considering evidence of events two years ago and more, as apparently happened in the first contract application, there is an undeniable prejudice that goes with the litigation of events long past, particularly when there has been no indication that they would be in issue. In some circumstances, the balancing of the interests involved will result in such litigation being necessary. Sometimes neither party objects. Here, the prejudice argued by the union to itself and its members in having relied on the finality of the certification proceedings to engage in collective bargaining, a protracted labour dispute and lengthy litigation, is more specific and evident than the general prejudice in litigation of stale claims. The impact on the pattern of relationships developed in the interim is fundamental. No opportunity to address the issues when fresh or to alter positions to deal with them was available. The reasons for the delay are not particularly persuasive. The length of the delay is in the range referred to as extreme and unacceptable in the Board's jurisprudence.

37. Employer counsel also argues that one should not be allowed to profit by one's own improper conduct. By definition, Rule 72 applies to allegations of wrongdoing; if those alleged to have done wrong were exempt from invoking it, it is difficult to see what application it would have. Although section 59 allows issues of fraud to be raised at any time, it gives the Board discretion as to whether or not it will terminate bargaining rights, even where fraud is found.

38. We have considered the importance and fundamental nature of issues relating to membership evidence and have given it due weight in balancing the competing interests present here. We are of the view that the considerations of finality of litigation and prejudice to all parties in light of the history of this bargaining relationship in the last two years should, on the facts of this case, take precedence. We are of the view that this is a case in which the delay is so long and the prejudice to the parties so evident that it is an appropriate case to find that the delay is a bar to any relief otherwise available under the section. If the relief would not be granted, and given the lack

of particularity discussed above, it would be fruitless to engage in the litigation desired by the applicants.

39. Subsequent to our brief "bottom line" decision dismissing the applications, the Board received a letter from one of the applicants asking for clarification as to what would be necessary to persuade the Board to order a representation vote. It made reference to how the Board deals with petitions in certification applications. We would observe that this is a termination application and that it is not appropriate for the Board to provide legal advice or opinions on applications not currently before it.

40. For all the above reasons, we dismissed the applications.

**0944-92-G Bricklayers, Masons Independent Union of Canada, Local 1, Applicant
v. Crestview Masonry Co. Ltd. Respondent**

Construction Industry - Construction Industry Grievance - Contempt - Employer failing to attend and bring records to hearing as directed by Board - Board advised that on day of hearing, employer delivering certain records to union office - Board citing employer for contempt and issuing arrest warrant for next day of hearing - Parties to have further opportunity at next day of hearing to address characterization of employer's previous failure to comply with Board's directive and any penalty therefor

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *W. N. Fraser* and *C. A. Ballentine*.

APPEARANCES: *Mark Lewis* and *J. Meiorin* for the applicant; no one appearing for the respondent.

DECISION OF THE BOARD; October 9, 1992

1. This is a referral of a construction industry grievance to arbitration under section 126 of the *Labour Relations Act* ("the Act").

2. It has the following history:

- (a) The matter was originally listed for hearing on July 10, 1992 at which time the parties agreed to adjourn until August 10, 1992. The agreement to adjourn contemplated a meeting at the respondent's accountants on July 15, 1992 when the union would have the opportunity to review and copy documents it had subpoenaed by way of subpoena *duces tecum*, on Guiseppe (Joe) Cavuoti but which had not been produced. See the Board's decision dated July 10, 1992.
- (b) On August 10, 1992 Mr. Cavuoti was once again summonsed with a subpoena *duces tecum*. He did not appear nor did anyone on his behalf. Nor were the documents produced to the union. A warrant for Mr. Cavuoti's arrest was issued, the Board (differently constituted in part) having satisfied itself that he had been duly served with

the subpoena and that his presence was necessary to the grievance and the ends of justice. He was ordered arrested and brought before the Board on September 8, 1992. See the Board's decision dated August 10, 1992.

- (c) On September 8, 1992 Mr. Cavuoti was brought to the Board hearing pursuant to the above Warrant for his Arrest. He had not brought the documents necessary to the case. It was agreed that the hearing should be adjourned to September 15, 1992. Mr. Cavuoti agreed to produce the documents which had been subpoenaed. The Board directed him to produce the documents to the union by September 11 and to appear on September 15, 1992. The Board warned Mr. Cavuoti of the possible consequences of failing to appear or comply with the Board's directions.
- (d) On September 15, 1992 Mr. Cavuoti failed to appear at the Board's hearing. The Board was advised by union counsel that Mr. Cavuoti had promised to produce the documents on September 11 and 14, 1992 and had not done so.

3. At the hearing on September 15, 1992 union counsel asked the Board to cite Mr. Cavuoti for contempt and to have him arrested and held in police custody until such time as he produces or arranges to have produced to the union the subpoenaed documents. The union reserved the right to argue that costs be awarded against Mr. Cavuoti when the matter proceeds on its merits.

4. At that point it appeared to the Board that Mr. Cavuoti was clearly in contempt of the Board's directions of September 8 to provide the subpoenaed documents by September 11 and to appear on September 15. We were considering the penalty suggested by union counsel.

5. Subsequent to the September 15 hearing and before our decision had issued, union counsel quite properly contacted the Board to inform us that "at some point in the afternoon of Tuesday, September 15, 1992, certain documents were delivered to the union, allegedly dealing with the respondent's payroll." Union counsel submitted that the documents were incomplete and urged the Board to treat Mr. Cavuoti as having failed once again to comply with the Board's directions. However, the delivery of these records to the union may amount to partial compliance with the Board's directives as to production of records.

6. We have carefully considered how to deal with the circumstances outlined above. It is abundantly clear that Mr. Cavuoti failed to appear on September 15, 1990. We will deal with that aspect of the facts by issuing a Warrant for his Arrest for the next date of hearing. See *Casalbil Contractor Limited*, [1980] OLRB Rep. Sept. 1278. We are satisfied from the Board's decision of September 8, 1992 that Mr. Cavuoti was orally personally directed by the Board to appear on September 15, 1992. Further, that decision was mailed to him. We are further satisfied from the Board's decision of August 10 and September 8, 1992 that his presence as a witness is necessary and material to the ends of justice herein.

7. The Board therefore finds it appropriate to issue a Warrant for the arrest of Joe Cavuoti directing that he be arrested and brought before the Board for the hearing of this grievance at 9:30 a.m. on December 18, 1992, at the Board's hearing rooms on the 6th Floor of 400 University Avenue in the City of Toronto. The Warrant should require that Joe Cavuoti bring with him the documents originally summonsed, that is, originals or copies of all payroll records, including time

sheets, computerized payroll records and pay stubs, of all employees of the respondent for the time period commencing January 1, 1991 and originals or copies of all employer contribution reports in respect of members of the applicant completed and filed by the respondent from and after January 1, 1991, which are in his possession or power when he is arrested.

8. As noted above, the delivery of some records to the union may amount to partial compliance with the Board's directives as to production of records. In all the circumstances, the Board considers it appropriate to give notice that the parties will have a further opportunity to address the characterization of Mr. Cavuoti's previous failure to comply with the Board's directives and any penalty therefor at the next day of hearing. This will also serve as notice that if Mr. Cavuoti fails to provide the summonsed records at the next day of hearing, he may be cited for contempt in the face of the tribunal, and the parties may address that issue, and any penalty therefor, should it arise at that time. See in general on the topic of contempt before administrative tribunals *Re. Hawkins and Halifax County Residential Tenancies Board*, 47 D.L.R. (3d) 118, *Re. Diamond and OMB*, (1962), 32 D.L.R. (2d) 103, [1962] O.R. 328, and most recently, *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, a decision of the Supreme Court of Canada dated June 25, 1992, File Nos. 22151 and 22152, as yet unreported.

9. In order to determine to what extent Mr. Cavuoti continues to be in contempt of the Board's directives to produce the documents summonsed, we hereby direct the union to set out in detail what has been provided by Mr. Cavuoti and what documents are still necessary to prove its case and file that with the Board, with a copy to Mr. Cavuoti, within seven days of the receipt of this decision. Mr. Cavuoti is directed to produce copies of the remaining documents to the union forthwith and to bring the documents to the next date of hearing, unless otherwise agreed by the parties.

10. In order to assist the parties with the possible settlement of this matter we hereby authorize a Labour Relations Officer to confer with the parties and to do a check of the respondent's records if necessary.

11. We would like to make it very clear to Mr. Cavuoti that he must comply with the Board's directives. He may face fine or imprisonment if he does not. See *Rino Zanette (1981) Ltd.*, [1986] OLRB Rep. Nov. 1572. Because of his failures to appear and comply with other Board directives, it has not as yet been possible to ascertain what the grievance itself involves. By failing to cooperate, Mr. Cavuoti risks making the matter much more serious than any potential liability from the grievance itself. We cannot emphasize too strongly that Mr. Cavuoti should discuss this matter with the Labour Relations Officer and the union, see if the matter can be resolved, and comply with the Board's directives. He has the right to have a lawyer to assist him, although he is not obliged to do so.

12. To summarize, the Board directs as follows:

- (1) The union is to inform the Board and Mr. Cavuoti within seven days of the material outstanding from the summons served on him for the August 10, 1992 hearing date.
- (2) Guiseppe (Joe) Cavuoti is required to produce copies of the documents required in the original summons issued to him for the hearing of August 10, 1992 and continued by Board directives to him on September 8, 1992 to the union forthwith after receiving notice from the union of those documents it still requires.

- (3) Mr. Cavuoti is directed to discuss this matter with a Labour Relations Officer and to attempt to resolve the matter.
- (4) Mr. Cavuoti is directed to appear at the Board on December 18, 1992 at 9:30 a.m. and to bring all the documents summonsed with him unless otherwise agreed between the parties. Because of his failure to appear on August 10 and September 15, a warrant for his arrest will be issued as attached.
- (5) The purpose of the hearing on December 18, 1992 is to consider the following issues, as and if still necessary:
 - a) the merits of the grievance referred for arbitration by the union;
 - b) whether Mr. Cavuoti's past failures to comply with the Board's directives should be characterized as contempt and if so, with what penalty;
 - c) if Mr. Cavuoti fails to produce the documents on December 18, 1992, whether this constitutes contempt, and if so, with what penalty.

13. Being so advised by the applicant, the Board notes that Guiseppe (Joe) Cavuoti's home address is 365 Hillmount Avenue, Toronto, Ontario (from where the respondent also apparently carries on business). He is said to be approximately 5 feet 8 inches tall, of medium build, 45 to 50 years old, and with dark but graying hair. He is clean shaven with no apparent distinguishing marks. His home and business phone number is said to be 782-8270 and his mobile phone number 402-5990.

14. If this matter is resolved between the parties so that the hearing is no longer necessary the parties are directed to notify the Board immediately so that the warrant for Mr. Cavuoti's arrest might be vacated.

2645-91-G International Association of Bridge, Structural and Ornamental Ironworkers, Local 736, Applicant v. **Ellis-Don Construction Ltd.**, Respondent v. International Brotherhood of Painters and Allied Trades, Intervener

Adjournment - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Applicant union resisting employer and intervener union's request that Board defer consideration of grievance to allow filing of jurisdictional dispute complaint - Board seeing no reason why jurisdictional dispute forum not appropriate to deal with situation where work assignment given by contractor to trade with which it does not have collective agreement - Grievance adjourned and to be listed with pending jurisdictional dispute

BEFORE: *Jules Bloch*, Vice-Chair, and Board Members *W. H. Wightman* and *C. McDonald*.

APPEARANCES: *E. del Junco* and *Brian Doherty* for the applicant; *Walter Thornton* for the respondent; *J. James Nyman* and *George McMenemy* for the intervener.

DECISION OF THE BOARD; October 2, 1992

1. This is a referral of a grievance to arbitration pursuant to section 126 (formerly section 124) of the *Labour Relations Act*. The Board is asked by the respondent and intervener to defer consideration of this application to allow the filing of a jurisdictional dispute pursuant to section 93 (formerly section 91) of the Act. On April 29, 1992, another panel of the Board found that the Board had jurisdiction to deal with this dispute as a jurisdictional complaint. At paragraph 10 of that decision the Board stated:

10. We do not propose to recite the jurisprudence dealing with this issue. For reasons similar to those expressed by the Board in the recent decision in *Robertson Yates Corporation Limited* (as yet unreported, April 21, 1992, Board File No. 1989-91-G, attached), the Board is satisfied that the facts do disclose that the applicant trade union is requiring the employer, in this case Commercial Glass and Aluminum, to assign particular work to it, rather than to members of the Painters union. We do not reach this conclusion because Ellis-Don was acting as agent for the Ironworkers when it passed the Ironworkers' grievance on to Commercial Glass, together with the instruction that Commercial Glass assign the work to members of the Ironworkers. Rather, because of the nature of the construction industry, as more fully expanded upon in *Robertson Yates, supra*, and the nature and purpose of the subcontracting clauses in agreements in the construction industry, we are satisfied that, the applicant union was demanding of the employer, although indirectly, that the work in question be assigned to its members, rather than to members of the Painters. The nature of the grievance itself was such a demand, and when it was passed on or communicated to Commercial Glass, in practical terms the demand was then being made of the employer, as well as of the general contractor.

2. The applicant, International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 ("Ironworkers") has asked the Board to refrain from deferring the grievance between the respondent Ellis-Don Construction Ltd. (Ellis-Don) and itself on grounds that Ellis-Don is asserting that the intervener, International Brotherhood of Painters and Allied Trades (Painters), does not have bargaining rights with Ellis-Don. Further, the Ironworkers argue that because Ellis-Don and the Painters are said not to be in a bargaining relationship the Board should continue with the grievance and view it as a breach of the general contractors responsibility to subcontract work to a subcontractor with a contractual relationship to the Ironworkers. Ironworkers counsel argues that section 1(5)(e) of the Ironworkers Collective Agreement includes all the work which would be the subject of a jurisdictional dispute. Further, he submits that a decision by the Board with respect to the breach of the collective agreement would not in any way impair the Board later making a decision about the assignment of work. In effect, the decisions about contractual obligations can be made without in any way affecting decisions about work jurisdiction. Counsel for the Ironworker submits two cases for this proposition. The first *Northdown Drywall & Construction Limited v. United Brotherhood of Carpenters & Joiners of America, Local 18; The Wood, Wire & Metal Lathers International Union, Local 562; Robertson-Yates Corporation Limited* [1972] OLRB Rep. June 666 and *United Brotherhood of Carpenters & Joiners of America, Local 785 v. Robertson-Yates Corporation Limited v. Labourers International Union of North America, Ontario Provincial District Council* [1992] OLRB Rep. Apr. 507. In *Northdown Drywall* (*supra*) counsel for the Ironworkers relies on paragraphs 4 through 6 of that decision. In that case the Board was asked to sort out the inconsistent contractual arrangements of the general contractor. The Board was not asked to sort out which of the two unions had the better claim to the work at hand. If in that case a choice had to be made about work jurisdiction, rather than attempting to absolve the contractor of contractual decisions that it made, then surely the Board, in that case, would have allowed for a jurisdictional dispute to take place. The second case, that counsel points us to, is a

quote from *Robertson Yates* (supra) at paragraph 33 of the decision, which quotes from an unreported Ontario Hydro case. In that case the parties were dealing with damages which flowed from the failure to hold a mark up meeting. The Board held that it could determine the quantum of damages without actually determining whether the assignment in question had been correctly made. In effect, the Board in Hydro was asked to determine on the balance of probabilities what assignment the employer *would* have made had a mark up meeting been held. That is not the same as the issue in a jurisdictional dispute, which determines the correct assignment in all the circumstances.

3. In the case at bar there is an intertwining of contractual matters with work assignment matters. If the Board were to find that Ellis-Don had properly assigned the work in question to the Painters then Ellis-Don might be successful in its defence of the grievance filed by the Ironworkers. In a jurisdictional dispute should Ellis-Don be found to have made an improper work assignment then the grievance would be brought back on and should the Ironworker win, damages for failing to subcontract to a company with contractual relations with the Ironworkers would be assessed.

4. All parties agree that save and except the bargaining rights issue, this would be a proper case for deferral, in that the work in dispute, on its face, is work that either trade has done. It is important to note that although Ellis-Don states that it has no bargaining rights with the Painters, the Painters have asserted that they have bargaining rights with Ellis-Don. The Ironworkers on the other hand have not argued against the Painters assertion. It would be impractical for the Board to allow this grievance to continue only to have the Painters assert their collective agreement rights and file a jurisdictional dispute. This would create a very cumbersome process whereby a grievance would be continuing at the same time as a jurisdictional dispute. The Board would be addressing overlapping issues in two separate forums. In this instance it seems like an unnecessary multiplicity of proceedings.

5. There is no reason why the jurisdictional dispute forum is not the proper forum to deal with a situation where a work assignment is given by a contractor to a trade with which it does not have a collective agreement. This is especially so when the trade, although without a bargaining relationship, has done the preponderance of the work in that Board area. (See *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, Complainant v. Pigott Construction Limited, Respondent v. United Brotherhood of Carpenters and Joiners of America, Local 27, Intervener # 1 and Labourers' International Union of North America, Local 506, Intervener # 2* [1992] OLRB Rep. June 748 (Pigott 2)).

6. For all the foregoing reasons we ask the Registrar to adjourn the grievance and list it with the pending jurisdictional dispute. Further we allow any party to file a jurisdictional dispute within fourteen days of the release of this decision. Should no jurisdictional dispute be filed within that time we direct the Registrar to relist the grievance.

7. This panel is not seized.

0158-91-R; 0790-91-R Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. **Italian Canadian Benevolent Corporation (Toronto District)** Respondent; Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. Italian Canadian Benevolent Corporation (Toronto District); The Italian Canadian Benevolent Seniors' Apartment Corporation; and Italian Canadian Projects for Seniors Inc. (Toronto District), Respondents

Certification - Construction Industry - Related Employer - Remedies - Board finding developer, owner and contractor to be separate entities under common control and direction engaged in related activity - Board exercising discretion to grant single employer declaration limited to agreed to bargaining unit - Certificates issuing

BEFORE: *K. G. O'Neil, Vice-Chair, and Board Members W. N. Fraser and H. Kobryn.*

APPEARANCES: *D. McKee and Luis Camara for the applicant; Michael Horan, P. Di Iulio and Ugo Di Federico for the respondents.*

DECISION OF K. G. O'NEIL, VICE-CHAIR, AND BOARD MEMBER H. KOBRYN; October 8, 1992

1. This is the continuation of an application for certification and a related application under section 1(4) of the *Labour Relations Act* ("the Act"). Having regard to the agreement of the parties, these matters were consolidated.
2. It appears from the corporate records filed with the Board that the correct corporate name of the respondent in the certification application is, and is hereby amended to read: Italian Canadian Benevolent Corporation (Toronto District). It will be referred to as ICBC in the remainder of the decision.
3. ICBC was established in 1971 and has organized a large number of projects in Toronto's Italian-Canadian community since that time. The applicant seeks bargaining rights for its carpenters and carpenters' apprentices in the industrial, commercial and institutional (ICI) sector of the construction industry as well as work in all other sectors of the construction industry in Board Area 8. The reply states that ICBC has no employees in the bargaining units sought.
4. The work at issue was performed on the construction site of a seniors' apartment building known as Casa del Zotto, which opened in June, 1991. The parties were in dispute as to the nature of the work performed by persons on the Casa del Zotto project on the application date of the certification application. By decision dated July 16, 1992, the Board (somewhat differently constituted) determined that there were two carpenters at work in the bargaining unit on the date of application.
5. The section 1(4) application claims that ICBC is a related corporation to the two other respondents, being the Italian Canadian Benevolent Seniors' Apartment Corporation (ICBSAC) and Italian Canadian Projects for Seniors Inc. (Toronto District) which will be referred to as PSI in this decision. PSI says that it is the employer of the employees referred to in the application for certification. ICBSAC is the owner of the land on which Casa del Zotto was built, and since its opening, is its operator. All the respondents are non-profit corporations without share capital.

6. The thrust of the applicant's case in the 1(4) application is that for a certificate to have any meaning and for bargaining rights to be viable the certificate must issue for all three corporations. The union maintains that the only ongoing economic vehicle is the ICBC, whereas PSI can disappear tomorrow and is already dormant. By contrast, the respondents maintain that the three corporations are not under common direction and control, and that in any event, and in the alternative, the Board should not exercise its discretion in the circumstances of this case. The respondents describe the three corporations as playing the roles of developer (ICBC), owner (ICBSAC) and contractor (PSI) and say that the Board does not normally use section 1(4) to link entities in those traditional relationships in the construction industry. We turn now to the facts underlying this dispute in more detail.

7. Casa Del Zotto is a two hundred and two unit apartment building for seniors, which now stands adjacent to another seniors' apartment building, Caboto Terrace, which is also owned by ICBSAC. Faced with a long waiting list at Caboto Terrace, which was opened in 1984, the ICBC had market studies done which demonstrated that there was a pressing need in the Italian-Canadian community for more housing for seniors who wished to live an independent life. This identified need led to negotiations which resulted in a federal-provincial agreement on an allocation of funds to permit the construction of the future Casa del Zotto. This allowed ICBC to apportion and sell a piece of land, evaluated by the Ministry of Housing and others at arm's length, to ICBSAC at the time of construction. The land still enjoys the tax exempt status which was given to ICBC by private statute. The tax exempt status survives as long as the project is consistent with the purposes of ICBC. The Board of the ICBSAC, which is composed of the same individuals who make up the executive committee of ICBC, had decided to proceed with the project and successfully applied for Ministry of Housing funds, based on its good track record in running Caboto Terrace.

8. A number of volunteers agreed to act as principals of a new corporation, PSI, which was incorporated in March, 1990, for the purpose of building the future Casa Del Zotto. With the approval of the Ministry of Housing, the contract for the construction of the building was given to PSI. The evidence before us was that the contents of the contract between PSI and ICBSAC were effectively dictated by the Ministry of Housing in that the funding was coming directly from the Ministry. The contract contemplates that PSI would also be executing a contract with ICBC respecting the construction of a day care centre on lands leased from ICBSAC (presumably this refers to the day care centre now operating within Casa del Zotto). ICBSAC obtained the funds and paid for the land and professional services. The money was dispensed to PSI by ICBSAC in payment of invoices from PSI. PSI was managed by way of a volunteer construction committee, which over the course of two years met almost every two weeks to oversee the contract. It called for bids at the sub-trade level, not at the general contractor level. PSI contracted out all the work on the construction of Casa del Zotto, with the exception of a small amount of work which is the subject matter of these applications. The Board's July 16, 1992 decision contains a description of some of that work, which ranged from clean-up to carpentry work. The carpentry trim contract was given to a "union" contractor.

9. The construction committee, whose mandate was to put up the building below or on budget, was composed of three volunteers with signing authority, recruited on the basis of their construction expertise and profile in the Italian community. The original Chair of the committee was Robert Fusco, Past President of ICBC, and thus a member of the Board of Governors of ICBC. He was succeeded by Silvio De Gasperis, who was also 2nd Vice-President of both ICBC and ICBSAC and President of three-member Board of Governors of PSI. Another member of the Board of Governors of PSI was Paul Pellegrini, also a member of ICBC's Board of Governors. The third member, Galli Tiberini, had no position on the Boards of ICBC or ICBSAC, but was

known in the Italian community to have significant construction expertise as a builder/developer. During various stages of the construction of Casa del Zotto, the committee drew on other volunteer resources. This included the regular attendance at the bi-weekly meetings of Palmocchio Di Iulio, Executive Director of ICBC, and Ugo Di Federico, Director of Finance of ICBC. Mr. Di Iulio and Mr. Di Federico had no named post in PSI but saw their roles as community helpers, a role that Mr. Di Iulio has played on a large number of projects in the Italian-Canadian community. On the Casa del Zotto project, he regularly gave his advice, toured the construction site, and recruited people through his contacts in the community. Di Iulio was involved in isolating two or three candidates for Superintendent of the Casa Del Zotto project.

10. Tiberini directed Superintendent Ted Di Angelis who called for and bundled bids to be brought back to the committee. Tenders were put out for each phase of the operations such as excavation, etc. Tiberini received tenders from the sub-trades and negotiated contracts with them. He also inspected the site and resolved problems with which the superintendent had difficulty. When PSI was in need of an accountant, Tiberini asked Di Federico to find one which he did. The accountant was then hired by PSI, reported to Messrs. Di Gasperis and Tiberini and has subsequently gone to work for ICBSAC.

11. Prior to the incorporation of PSI, ICBC paid the salary of Ted Di Angelis, who later was superintendent of the construction of Casa del Zotto, and an employee of PSI. PSI was later charged for the salary of Mr. Di Angelis during that period. Mr. Di Angelis and his helper, Craig Gray were two long-term employees of PSI. Clean up and miscellaneous things were handled by the staff of a minimum of three and a maximum of seven. Mr. Di Angelis was in charge of who was to be hired and fired. PSI paid the employees involved in these applications. Individual employees talked to the committee and got their pay raised during the construction of Casa Del Zotto. Some applications filled out by prospective employees had "ICBC" handwritten at the top of application forms obtained from an unrelated firm. The evidence suggested that this may be explained by the fact that Mr. Di Angelis received his first several paycheques from ICBC before PSI was incorporated and its payroll established. ICBC's name also appeared on the architects' plans, which the respondent explains by saying that ICBC was playing the role of project developer.

12. After the opening of Casa Del Zotto in June 1991, approximately 10 percent of the work was left including cleaning, deficiencies and odds and ends. Two employees of PSI helped out for about a week in August 1991 in readying a snack bar at the Columbus Centre, which is owned by the ICBC, for opening. PSI is now a dormant corporation with minimal assets limited to certain tools and supplies. It owns no land, equipment or other major assets.

13. The role of the ICBC in the Casa del Zotto project began with the genesis of the idea. In the construction phase the connection was that ICBC's Director of Finance and Executive Director attended the meetings of the Construction Committee and offered their advice and assistance liberally. Mr. Di Iulio agreed with union counsel's characterization of Casa Del Zotto as the fifth major project of ICBC. The other four were the construction of Villa Colombo Home for the Aged (1976), the construction of the Columbus Centre of Toronto (a community centre and fitness facility (1980)), Caboto Terrace (1984) and the development of the Vita Community Service of Toronto (1987), which services the developmentally handicapped. ICBC was also instrumental in developing the Joseph D. Carrier Art Gallery (1988) within the Columbus Centre. Money was raised to build both Villa Colombo and the Columbus Centre by the ICBC. After its establishment each organization has had its own Board of Directors. However, many of the people involved are the same. The evidence indicated that the track record of ICBC and ICBSAC in successfully mounting and maintaining these various projects was an important consideration in the Ministry of

Housing's willingness to award the allocation to ICBSAC which enabled Casa Del Zotto to be built.

14. For the above organizations other than ICBSAC, ICBC covers deficits. These occur annually, in the case of Villa Colombo, Colombo Centre and Vita Community Living Service. Vita receives direct operating funds from the Ministry of Community and Social Services and capital funding indirectly from ICBC. ICBC has no intention of covering deficits for ICBSAC, which Di Iulio did not foresee in any event. Both Caboto Terrace and Casa del Zotto run on zero based budgeting, being entirely funded by government. Casa del Zotto's budget is entirely controlled by the funds made available by the Ministry of Housing. Surpluses and deficits are intended to be dealt with by the Ministry.

15. Nursing and non-nursing staff at the Villa Colombo Nursing Home are covered by collective agreements between the nursing home and ONA and CUPE, respectively.

16. ICBC's general mandate is to look for new ways to serve the community. This has manifested itself in the various projects which it has mounted. ICBC's direct operations include a catering service in the Villa Colombo building which employs a hundred and five people and less than ten employees in administration including Mr. Di Iulio, Mr. Di Federico, some secretaries and clerks. ICBC owns the building which houses the Columbus Centre and Art Gallery and owns the houses which are operated independently by Vita Community Living Services of Toronto. PSI's accountant had his office in the Columbus Centre where Di Federico's office is as well. PSI was charged for the use of space by ICBC who owns the building. Columbus Centre is leased from ICBC, as is the Villa Colombo Building. Columbus Centre subleased to PSI as well as many other groups. ICBC also publishes a newspaper/magazine called Life-style which it sees as another means of outreach to the Italian Canadian community.

17. ICBC has no formal role in the ongoing operation of Casa Del Zotto. It is administered by the Administrator of Caboto Terrace, the other seniors' apartment building on land owned by ICBSAC. Mr. Di Iulio, through his contacts in the Italian Canadian community, passes resumes on to the administrator, refers people as they might be needed and gives his point of view if asked.

18. The construction committee used by PSI to get Casa del Zotto built was not dissimilar to the vehicle used for building Villa Colombo, Columbus Centre or Villa Caboto. Mr. Di Iulio agreed that in each case the concept started with the ICBC and was carried out by a committee whose members had a variety of relationships with ICBC which varied with the funding mechanism. Mr. Fusco, the original chair of PSI and its construction committee, earlier chaired the construction committee for the Columbus Centre.

19. During the life of Caboto Terrace's construction committee, Mr. Di Iulio was Assistant Executive Director of ICBC and attended a good number of the meetings. The members of the committee had no position with ICBC at the time. However, ICBC was the driving force behind the project. The general contractor was Caboto Terrace Apartment Corporation which has been essentially dormant since. It is an agreed fact that Caboto Terrace Apartment Corporation had been involved in building at the Lawrence and Dufferin site under a different name in respect of the construction of Villa Colombo following 1976. Its charter was revoked when its corporate returns were not filed for four to five years. It was the evidence of Mr. Di Federico that it would have been more trouble than it was worth to resurrect the inactive corporation to build Casa del Zotto; it was easier to incorporate a new entity. ICBC and ICBSAC were also apparently dissolved at one time but they were revived because they had assets which the Caboto Terrace Corporation did not. In respect of Vita Community Living Services, its active board performed the role of con-

tractor for certain group homes. A committee was used to do the construction and ICBC applied for funds to build them on land it owned.

20. In argument, employer counsel stressed that the emphasis must be on the locus of managerial control, as found in the Court of Appeal's decision in *Ontario Legal Aid Plan v. OPSEU*, [1991] November OLRB Rep. 1327. In the Court's view, the Board erred in not taking into account the statutory basis for the Ontario Legal Aid Plan's involvement in the affairs of the legal clinics with whom it had been declared by the Board to be a common employer, and thus misconstrued a regulatory relationship as an employer-employee relationship.

21. Employer counsel also argued that the following cases should be of assistance to the Board. In *Dalton Engineering* [1988] June 567 a 1(4) declaration was refused on the basis that even if the preconditions existed it would not be a proper case for the exercise of the Board's discretion, because the owner kept control over the work and contracted directly with the subcontractors argued to have been engaged in breach of the general contractor's obligation to subcontract to unionized outfits. In *Specialized Transit* [1991] OLRB Rep. July 900 the Board held that the TTC who had contracted out transportation services for the disabled had not retained managerial control. Therefore it was not included in the 1(4) declaration that covered two related suppliers of transportation services for the disabled. The Board said that bargaining rights attached to a definable commercial activity, rather than the legal vehicle through which the activity is carried on.

22. The employer also argued that a 1(4) declaration would have an unnecessary and confusing effect on the ongoing operations of the organizations housed in the buildings referred to above. These include a home for the aged, a catering business, a restaurant, a fitness facility, a day-care centre, an art gallery, as well as services to the developmentally handicapped. Union counsel responded that the declaration could be limited to the bargaining unit applied for.

23. The union's position is that PSI is nothing more than a legal form for ICBC's and ICBS-AC's ongoing construction activity. Union counsel referred to *Beacon Vanier*, [1984] Dec. OLRB Rep. 1682. In that case, the Board stated that in a situation of a certification application and a related 1(4) application, the Board looks not only for related activities, but a form of joint control over important aspects of the employment relationships which would be the subject of collective bargaining. The Board granted the declaration with a certification application where a *prima facie* case was made out and no reason was advanced not to grant it, the respondents having failed to appear.

24. The union's argument also made reference to the following cases: In *Gottcon*, [1989] July 757 the Board said that a 1(4) would be granted to create a viable bargaining unit within an integrated workforce, prevent undue fragmentation and prevent the possible erosion of bargaining rights. In *Tactix*, [1990] April 467, where there was no common ownership, but construction was under the control of one person, the statutory conditions for a 1(4) declaration existed. The potential for erosion of bargaining rights led the Board to grant the declaration. *York Condominium*, [1977] October 645 was cited for the factors for determining who was the true employer.

25. Both counsel referred to *Walters Lithographing*, [1971] OLRB Rep. July 406 for the traditional indicia of the presence of the prerequisites for a section 1(4) declaration. As the Board indicated in that case, the appraisal under section 1(4) is based on all of the criteria in light of the particular facts; the greater the degree of functional coherence and interdependence, the more likely a declaration is to follow. Looking at those criteria, the following comments about the facts of this case may be made:

- (a) Common ownership of financial control: Since the three corporations

involved are corporations without share capital ownership is not a factor which assists in the analysis of these facts. Financial control over the construction of Casa del Zotto was held by the volunteer construction committee, which utilized the advice of ICBC's Mr. Di Federico from time to time.

- (b) Common management: The only managerial employee was Mr. Ted de Angelis, who had no managerial role outside PSI. The managerial control over Mr. De Angelis was exercised by the volunteer construction committee. Two of the signing officers of PSI were on the Board of Directors of either or both of ICBC and ICBSAC at all material times. An unusual aspect of this fact situation is that the committee which exercised managerial control was entirely volunteer, and none of them stood to gain financially. In this respect, the signing officers, the "official committee", were indistinguishable from the other volunteers, including Di Federico and Di Iulio, who were regularly involved in the decision making meetings as advisers, although they were being paid by ICBC. Di Iulio did recruiting for PSI.
- (c) Inter-relationship of operations: The construction of Casa del Zotto was an interrelated operation, but the only one. PSI was set up to do the project. There was no integrated work force; the fact that some of PSI's employees worked at the Columbus Centre for a short period of time is not sufficient to establish one. On an ongoing operational basis, there is no relationship between PSI and the other two respondents as it is dormant. Between ICBC and ICBSAC the ongoing interrelation amounts to physical proximity and the regular use by ICBSAC of ICBC personnel as resource people.
- (d) Representation to the public as a single integrated enterprise: Evidence established that ICBC and ICBSAC were regularly referred to in ICBC publications as engaged in companion activities to service the Italian Canadian community. ICBC is sometimes referred to as the parent organization. This did not go so far as a representation to the public that the enterprises were structurally integrated. The managerial personnel of the ICBC and ICBSAC were regularly identified as attached to one or the other organization, and not to both. In the 1989 Annual Report of ICBC, ICBSAC was said to be building Casa del Zotto. It is also noted in ICBC publications that the location of ICBSAC's buildings puts tenants close to the services and programs of Columbus Centre and Villa Colombo. PSI was not mentioned in the materials distributed to the public.
- (e) Centralized control of labour relations: PSI's employee di Angelis did the hiring and firing. The construction committee set the wages of the employees. ICBC personnel were used as resource people and a signing officer of PSI was on the Boards of ICBC and ICBSAC.

that the prerequisites for a section 1(4) declaration are present on these facts. Section 1(4) reads as follows:

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

27. In our opinion, the construction of Casa del Zotto qualifies as a related activity within the meaning of section 1(4), carried out by or through more than one entity, being ICBC, ICBSAC and PSI. It is this activity that produced the employment which is the subject matter of the applications before us. See *Brantwood Manor Nursing Homes Limited* [1986] OLRB Rep. Jan. 9, among others, for a discussion of the breadth of the meaning of the terms “related activity or business.” The Casa del Zotto project was described as the fifth project of ICBC. ICBSAC was integral to the project as it was its track record that attracted the Ministry of Housing’s attribution of the housing unit funding. ICBC’s tax-exempt status applies to ICBSAC. ICBC’s senior staff regularly participated in PSI’s managing committee.

28. A number of factors indicate common control and direction both in a general and specific sense. Generally, ICBSAC and PSI are the products of the ICBC’s concepts for serving the Italian-Canadian community by providing housing for senior citizens. It can fairly be said that the three are jointly carrying out this portion of ICBC’s mandate. Insofar as this construction project is concerned, they are functionally interdependent. See *Kennedy Lodge Inc.* [1984] OLRB Rep. July 931 at paragraph 53. Although in an abstract sense it is true that the three corporations played the role of developer (ICBC), owner (ICBSAC) and contractor (PSI), at a practical level the unique facts of this case do not conform to the usual commercial configuration for these roles. They are not entities with independent genesis and mandates such as in *Dalton Engineering, supra*. Rather, the three entities together were responsible for the activity of building the senior citizens home to serve the Italian-Canadian community.

29. Specifically, there is overlap in the directorships of all three entities. Moreover, the role of ICBC’s senior staff in the management committee of PSI is significant. There is no indication that it was any less than the unpaid volunteers on the construction committee which managed the construction of Casa del Zotto.

30. We must then decide if our discretion to give the declaration requested should be exercised. As stated in *KNK Limited*, [1991] OLRB Rep. Feb. 209, where the legal requirements for s. 1(4) and the mischief at which the section is aimed have been established, the declaration should ordinarily issue unless there is either particular prejudice or compelling policy reasons for not doing so. Section 1(4) is designed to protect bargaining rights from erosion or enable them to be established where they are in danger of not being viable because of the real structure of the employer, or where there is difficulty in tying down the employment relationship. That is the “mischief” which the legislature was seeking to deal with, particularly, although not exclusively, where there were attempts to circumvent or avoid dealing with a unionized workforce.

31. This is not a case where it is alleged or shown that the arrangement among the respondents was in any way an attempt to avoid the union. There is evidence indicating otherwise; for example, the trim carpentry contract was let by PSI to a union contractor. Similarly, there is no evidence before us to suggest that ICBC or ICBSAC has or intends to conduct itself in the future in a manner intended to avoid unionization. The Casa del Zotto project is finished. The union says

PSI may disappear tomorrow, and another corporate vehicle appear to do the ongoing construction work of the ICBC and ICBSAC.

32. The construction activity referred to by the union as ongoing has been intermittent with spaces of three to five years between the projects. The evidence indicated there is none planned at the moment, although the search for ways to serve the Italian-Canadian community, which was described as moving north and west from the current sites, may in fact result in more construction.

33. We are satisfied, that although not crystallized at the moment, the potential for erosion of any bargaining rights obtained for the construction activity described above exists were we to refuse to grant the declaration and the respondents generate another vehicle to do construction. The incorporation of PSI to build Casa del Zotto was a matter decided on the basis of convenience from a corporate point of view. There is no reason for future construction to necessarily be done through PSI rather than some other corporate vehicle as has been done on previous construction projects. As was indicated by the Board in *West York Construction Limited* [1978] Sept. 879, *Kustom Insulation Ltd.*, [1979] OLRB Rep. June 531 and *Tactix*, *supra*, the union is not required to wait until the actual erosion has taken place to apply for a one employer declaration. There was no prejudice cited by the respondents flowing from a declaration under s. 1(4) other than potential confusion to the situation with other employees of the respondents. We are satisfied that this can be dealt with by limiting the declaration to employees in the bargaining sought. There are no compelling policy reasons to refuse the declaration, and its refusal might result in future litigation of the same issue, a result which it is good policy to avoid.

34. For all of the above reasons, we grant the declaration sought, limited to the bargaining unit agreed to which is as follows:

all carpenters and carpenters' apprentices employed by the employer in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and

all carpenters and carpenters' apprentices employed by the employer in Board Area 8 excluding the industrial, commercial and institutional sector, save and except non-working foreman and persons above the rank of non-working foreman.

35. Having regard to the findings of the decision of the Board dated July 16, there were two people in the bargaining unit. There are no remaining issues outstanding in the certification application, so we will deal with it here.

36. In this application for certification the applicant filed two certificates of membership. The certificates are signed by the members and indicate that monthly dues of \$20.00 have been paid for at least one month within the six-month period immediately preceding the terminal date of the application. The certificates are checked and certified correct by an officer of the applicant. The money was collected by one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

37. The respondent filed a reply and a list of employees within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.

38. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 141(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

39. The Board further finds that this is an application for certification within the meaning of section 121 of the *Labour Relations Act* and is an application made pursuant to section 146(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

40. The Board further finds, pursuant to section 146(1) of the Act, that all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

41. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 25, 1991, the terminal date fixed for this application and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

42. Section 146(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

.... the Board shall certify the trade unions as the bargaining agent of the employees in the *bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 146(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 38 above in respect of all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

43. Further, pursuant to section 146(2) of the Act, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the

Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

DECISION OF BOARD MEMBER W. N. FRASER; October 8, 1992

1. I dissent.
 2. I do not agree that the Board should exercise its discretion under s. 1(4) in finding that ICBC, ICBSAC and PSI constitute one employer for purposes of the Act.
 3. I do not believe that the Board should engage in speculation, as indicated in paragraph 33 of the decision. Should any future construction activity by ICBC or ICBSAC actually come to pass, that would seem to be a more appropriate time for the union to organize and certify any employees not already represented.
 4. For the foregoing reasons, I cannot agree with the decision of the majority. I would have dismissed the application for certification.
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0408-92-R Stephen Myers, Applicant v. Sheet Metal Workers' International Association, The Ontario Sheet Metal Workers' Conference and Affiliated Bargaining Agents Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539, 562, Respondent v. **Industrial Metal Fabricators Limited**, Intervener

Construction Industry - Parties - Termination - Union challenging standing of named applicant to bring application and arguing that application a nullity which may not be amended - Since named applicant not at work in bargaining unit on date of application, named applicant without status to bring application - Board, however, questioning utility of technical approach based on existence of "cause of action" and applicability of that approach in labour relations context - Board exercising its discretion under Rules of Procedure to add named petitioners as party applicants

BEFORE: *K. G. O'Neil, Vice-Chair, and Board Members F. B. Reaume and R. R. Montague.*

APPEARANCES: *Hank de Zoete, Elizabeth Forster and Stephen Myers for the applicant; Michael Mazzuca and Robert MacIntyre for the respondent; Edward W. Ducharme and F. Van Oir Schot for the intervener.*

DECISION OF K. G. O'NEIL, VICE-CHAIR, AND BOARD MEMBER F. B. REAUME; October 8, 1992

1. This is an application for termination of construction industry bargaining rights under section 58 of the *Labour Relations Act*. There are two issues before the panel, the standing of the applicant to bring the application, and the voluntariness of the petition in support of the application. This decision deals only with the first issue.

2. The application date in this matter is April 30, 1992 and the terminal date May 14, 1992. On May 19, 1992, the applicant wrote asking that Scott Benn and Alfred Charbonneau be added as party applicants according to Rule 79 of the Board's Rules of Procedures. On June 1, 1992, the respondent union wrote advising the Board and the other parties that the respondent wished to amend its reply by adding the issue of status of the applicant as he was not at work on the date of application. Further, they submitted that an applicant may not add additional applicants after the terminal date is passed.

3. The union argues that section 58 provides that only an employee in the bargaining unit may apply. Since this is the construction industry, only people at work on the application date are considered to be in the bargaining unit. Since it is agreed he was not at work on that date, the union argues the applicant has no status to bring the application and therefore it is a nullity. Because it is a nullity, counsel argues that the Board has no jurisdiction to add applicants since there is nothing to which one may add. The application never existed in law.

4. Union counsel observes that the style of cause in this case only applies to Myers, and not to others as in some of the cases where the Board has treated all the petitioners as applicants. He asserts that the wording of the petition before us leaves no possibility of other applicants. Counsel asserts that there is no evidence before the Board that could cause us to conclude that there are other applicants than Steven Myers. Counsel also maintains that the statute has drawn a clear distinction between applicants and petitioners: a petitioner has the right to confidentiality and an applicant does not. Counsel maintains there is no time period in which we could add a party because the matter was always a nullity.

5. From the conclusion that there are no other applicants than Steven Myers and that he has no status to bring the application, we are asked to conclude that we are without jurisdiction to add Messrs. Benn and Charbonneau as applicants, to consider issues such as the interpretation of Rules 79 or 84, or to hear the application. Counsel maintains that this is not an issue of policy nor a mere irregularity. Myers was not an appropriate party. Rule 79 cannot give the Board jurisdiction as it is a regulation only. Adding new parties cannot give a non party status. Myers has no status; the proceedings are a legal nullity, and therefore the matter must be dismissed.

6. Union counsel referred to a number of cases in argument. On the issue of the standing of the applicant, these were *Diplock Durable Floor Company Limited*, [1982] OLRB Rep. Aug. 1159; *Howard S. Clark Construction*, [1968] OLRB Rep. Apr. 62; *Uni-Form Builders Limited*, [1968] OLRB Rep. Apr. 60; *Stuart Riel Masonry Contractor*, [1984] OLRB Rep Nov. 1630; *Smale Bros. Company Limited*, [1986] OLRB Rep. July 1019; *Ro-Von Construction Limited*, [1991] OLRB Rep. Mar. 384. Specifically on the issue of the substitution or addition of parties, these were, *W.J. Realty Management Ltd. et al. v. Price et al* (1973), 1 O.R. (2d) 501 (C.A.); *Colville v. Small* (1910), 22 O.L.R. 426 (Div. Ct.); *Croll v. Greenhow* (1930), 38 O.W.N. 101, affd (1930), 39 O.W.N. 1 (C.A.); *Fields v. Purser* (1928), 35 O.W.N. 205; *St. Lawrence Rendering Company Ltd. v. The City of Cornwall*, [1951] O.W.N. 651 (High Ct.); *Turgeon et al. v. Border Supply (EMO) Ltd.* (1977), 16 O.R. (2d) 43 (Div. Ct.); *International Alliance of Theatrical Stage Employees, Local 58 v. Canadian Broadcasting Corporation*, [1972] 1 O.R. 161 (High Ct.); *Re McGhie et al and Canadian Air Line Flight Attendants' Association et al* (1986), 58 O.R. (2d) 333 (High Ct.)

7. Applicant's counsel argues that there are two bases on which the Board can proceed to hear the application. Firstly, the Board can grant the application to add the two additional parties under Rule 79 as it was made promptly and deserves favourable consideration. This is in line with the power under Rule 84 to cure technical irregularities which is what counsel argues this is. Counsel submits that this representation application is not a dispute between the parties, as in the juris-

prudence cited by the applicant. Rather, it arises because of a statutory scheme which provides a method for determining the wishes of employees to have or to not have a union represent them. Counsel argues that this is not a cause of action and thus the Court decisions on the power to cure defects should not be of assistance to the panel. Contrary to union counsel's submission that we should not be looking at the issue of prejudice because that is something that can happen only when the Board has jurisdiction, applicant's counsel maintains that we should exercise our discretion under Rule 79 because there is no prejudice to the union in so doing.

8. The second basis for proceeding is the line of cases which holds that petitioners are applicants. Counsel maintains that the jurisprudence supports the idea that one can look to any petitioner as an applicant. She underlines that most of the cases cited by the union were ones with a one employee unit. The issue is critical for the count but not so critical in dealing with the identity of the applicant. Applicant's counsel referred us to *St. Michael Shops of Canada Limited*, [1979] OLRB Rep. Oct. 1023, *Selinger Wood Ltd.*, [1979] OLRB Rep. May 434.

9. The employer's counsel said that he was content to leave the matter in the Board's hands.

10. Section 58 provides in relevant part as follows:

58.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be.
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as it determined under clause 105(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

• • •

11. Rules 79 and 84 of the Board's Rules of Procedure provide as follows:

79. The Board may direct that any person be added as a party to a proceeding or be served with any document, as the Board considers advisable.

84. No proceeding under these Rules is invalid by reason of any defect in form or of any technical irregularity.

12. The style of cause on the Form 17 filed by Mr. Myers is as above, listing Steven Myers as the only name in the line for applicant. The application was supported by a petition with the following heading which bears the signatures of nine people.

PETITION

to

Ontario Labour relations Board
400 University Avenue
Toronto, Ontario
M7A 1V4

We, the undersigned employees of Industrial Metal Fabricators Limited in Chatham, no longer wish to be represented by Local No. 235 Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' Conference or any of their affiliated local unions in the industrial, commercial and institutional sector of the construction industry in the province of Ontario.

Dated at Chatham Ont. On 29th day of April, 1992.

13. As set out in many of the cases cited above, the wording of section 58 and the Board's jurisprudence make it quite clear that an employee in the construction industry not at work in the bargaining unit on the date of application does not have status to bring an application for termination. Mr. Myers, the named applicant, therefore does not have status to bring this application. The real issue then is whether or not there are other applicants, either because the petition as a whole should be considered as a list of applicants or because the request to add two employees who were at work on the date of application as applicants should be granted.

14. We have carefully considered all the cases referred to in the thorough argument of union counsel. We acknowledge the judicial support shown there for the idea that substitution of a party should not occur when the original party had no cause of action. However, we are of the view that the cases involving the civil courts are of limited assistance to the Board in this matter. Whatever may be said of the utility of the technical approach elsewhere, we do not see it as equally applicable in this context. Firstly, Myers' situation is not strictly analogous to parties with no cause of action such as someone with no privity of contract trying to sue on a lease as in *W. J. Realty Management Ltd.*, *supra*. Myers had a "cause of action" whenever he was at work. He just did not happen to be at work on the application date.

15. More specifically, those wanting to be added as applicants are not newcomers to this proceeding. They are petitioners who have made it very clear that they wish to be applicants, thus waiving their right to confidentiality. They apparently signed a document petitioning the Board for termination of bargaining rights prior to the application and terminal dates. In that circumstance, given that it is undisputed that they would have had the right to bring the application on the application date, we see no sufficient reason to consider the application a nullity, or to find ourselves without jurisdiction.

16. Although it is not necessary to decide if all the petitioners should be considered applicants in this case, it is worth noting that the wording of the petition before us is not dissimilar from the petition in *St. Michael's Shops*, *supra*, where the Board found it to be a properly constituted

application for two bargaining units, despite the fact that the named applicant had no status in one of those bargaining units.

17. There are good labour reasons to exercise our discretion under Rules 79 and 84 to add Messrs. Benn and Charbonneau as party applicants. The application represents a work place issue which ought to be resolved. The application is by necessity representative. Without a petition showing support of forty-five percent of the employees in the bargaining unit, it would have no effect. The fact that Myers was not at work on the application date need not defeat those other employees' request to have the issue heard. There is no problem of notice, or other substantial labour relations problem, caused by the recognition of two of the petitioners as applicants. If in other cases, such problems were shown, other results might follow. Therefore, we will add Scott Benn and Alfred Charbonneau as applicants in this matter.

18. We had commenced hearing the evidence on the voluntariness of the petition on the last day of hearing, and set November 13, 1992 to continue if necessary. This matter will resume on that date at the "MacDonald Room", Compri Hotel, 333 Riverside Drive West, Windsor, Ontario, commencing at 9:30 a.m.

DECISION OF BOARD MEMBER RENE R. MONTAGUE; October 8, 1992

1. With respect I totally disagree with the majority decision.

2. I cannot agree that in the circumstances of this case that Scott Benn and Alfred Charbonneau be added as party applicants according to Rule 79 and 84 of the Board's Rules of Procedures after the application date of April 30, 1992.

3. Form 17 requires that the applicant provide a name, address and telephone number and a copy of Form 17 is sent to the respondent union. The union is required to reply on Form 20.

In accordance with Rule 72, if the union intends to adduce evidence that there has been improper or irregular conduct in the gathering of written evidence which signifies the employees no longer wish to be represented by the trade union, the union must file those facts on which it intends to rely prior to the hearing. It must be recognized that Form 17 requires that there be an applicant and the union is entitled to know who the applicant is in order to prepare its case at the Board. Section 111(1) of the *Labour Relations Act* prohibits the disclosure without the consent of the Board, of whether a person does or does not wish to be represented by a union.

In short, Form 17 requires the applicant to provide a name and a union is provided with a copy of Form 17. However, the union is not entitled to know the names of the petitioners. Accordingly, *the Labour Relations Act does not contemplate that petitioners are applicants*. The jurisprudence of the Board must be read in light of this fundamental nature of the Act and its Regulations.

4. I do not find that the adding of the above-named individuals as applicants is a defect in form or of any technical irregularity but rather *a violation of the rules*. In addition what we clearly have before us is not an application as contemplated by 58(2) of the Act. Had these two petitioners sought to have their names added during the open period as applicants maybe I could have agreed that the Board would have to amend the application. In this case however the amendment came 1 1/2 months after the date of application, the last day that it was possible to apply for terminating bargaining rights. For these reasons and for the reasons outlined by counsel for the union in the majority decision at paragraphs 3, 4, 5, I therefore would have dismissed this case.

0562-92-G; 0769-92-M United Brotherhood of Carpenters and Joiners of America, Local 18, Applicant v. **Matthews Contracting Inc.**, Respondent v. Labourers' International Union of North America, Ontario Provincial District Council, Intervener

Construction Industry - Construction Industry Grievance - Evidence - Practice and Procedure - Sector Determination - Parties disputing scope of work and scope of evidence relevant to sector determination - Board deciding that parties free to rely on industry practice throughout the province in regards to employee relations on the type of work in dispute - Subject of sector determination identified as work related to installation of large underground concrete storage tanks associated with water treatment purposes

BEFORE: *S. Liang*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

DECISION OF THE BOARD; October 21, 1992

1. Board File No. 0562-92-G, a referral of grievance to arbitration, is adjourned pending the disposition of Board File No. 0769-92-M. Board File No. 0769-92-M is a proceeding brought pursuant to the provisions of section 153 of the *Labour Relations Act* (a "sector determination").
2. This interim decision of the Board deals with two preliminary issues raised by the parties with respect to the scope of the Board's inquiry and the scope of evidence relevant to the inquiry. These proceedings started with a grievance filed by the United Brotherhood of Carpenters and Joiners of America, Local 18 ("the Carpenters") against Matthews Contracting Inc. ("the company" or "Matthews") on May 19, 1992, claiming that Matthews is in violation of the collective agreement binding the parties by its failure to employ Carpenters to perform certain work. The agreement under which the grievance is filed pertains to the industrial, commercial and institutional sector ("ICI") of the construction industry in Ontario and is a "provincial agreement" within the meaning of section 139 of the *Act*. Matthews takes the position that the work in question is not work in the ICI sector, but is work in the heavy engineering sector. The intervener, the Labourers' International Union of North America, Ontario Provincial District Council ("the Labourers") agrees with Matthews that the work in question is not in the ICI sector. In the alternative, the intervener states that the grievance is in essence a jurisdictional dispute which should be dealt with by the parties pursuant to the procedures under section 93 of the *Act*.
3. Prior to the second hearing date set for the referral of grievance (the first being adjourned on consent of the parties), the parties arrived at an agreement that the Board determine the sector issue pursuant to section 153 of the *Act*. Notice of the hearing was provided to a list of organizations which the parties judged as having an interest in the sector determination. After a further adjournment on agreement of the parties, the Board commenced the hearing of the matter on October 1, 1992. None of the parties to whom notice of the sector determination was provided appeared at this hearing.
4. The two preliminary issues relate to the scope of the work which is the subject of the sector determination, and the scope of evidence which is relevant to the determination. Matthews is engaged in the construction of a large underground concrete storage tank whose purpose is to hold storm run-off water and sanitary sewer material until these fluids can be processed by a sewage processing plant, to which the tank is connected. The project is located in Hamilton. Before the construction of this tank, storm run-off simply flowed through sewer lines into Hamilton harbour. The construction contract held by Matthews includes the construction of a parking lot on top

of the tank, as well as related sewer work. The Carpenters' grievance alleges that Matthews is in violation of the ICI agreement by its failure to employ any members of the Carpenters in the construction of the tank. The construction of the parking lot and the related sewer work are not included in the claim by the Carpenters. Members of the Labourers *were* involved in all aspects of the project.

5. As further background to this dispute, the Carpenters and Matthews signed a voluntary recognition agreement in March of 1991, binding Matthews to the ICI agreement. They also signed a corollary agreement which provided, among other things, that in the event that a *bona fide* question arises as to whether work performed or to be performed is within the ICI sector and hence covered by the agreement, the issue may be referred to the Board for determination. In such case, the Carpenters agree that it will not claim damages against Matthews with respect to such work, although this agreement not to claim damages does not apply where the Board has made a determination that the same or substantially similar work falls within the ICI sector for the construction industry prior to the time when bids for the work on a project are received or filed. At the hearing before us, counsel for the Carpenters confirmed that the Carpenters are not seeking damages with respect to the present dispute.

6. Among the documents and correspondence which have been exchanged between the parties is a chart from the Carpenters which sets out a list of similar work across the province which the Carpenters claim has been performed using members of the Carpenters working under an ICI agreement.

7. The Labourers and Matthews object to the introduction of this evidence. It is the submission of the Labourers that evidence as to how parties to similar projects have treated the work is irrelevant except as it pertains to the geographic area in which this dispute arises, and as pertains to this employer, which has practice throughout the province. Further, the Labourers assert that if it is relevant to know how other parties have treated this type of work, the Board will also have to hear evidence of projects involving non-union employees. Ultimately, it is argued, it will likely turn out that there is *no* generally accepted practice.

8. The Labourers also assert that the Board should not confine its sector determination to the construction of the storage tank, but should inquire into the project as a whole, including the road work and the sewer and watermain work. The agreement under which members of the Labourers performed this work is referred to as the Heavy Engineering agreement; however, it also covers work in the roads and the sewer and watermain sectors. In the submission of counsel, there is a longstanding collective bargaining relationship between the Labourers and Matthews applying this multi-sector agreement to similar projects. Most of the reservoirs on which the Labourers have done work in the past are connected to sewers and involve road work, and it would be unrealistic for the Board to distinguish between the various parts of the project.

9. In the submission of counsel for Matthews, in a sector determination, the Board should only look to the practice of the parties where it is dealing with a "grey area", and such practice should be confined to *local* practice. Where the primary focus of the Board's inquiry is the work characteristics which distinguish one sector from another, to hear evidence as to a list of projects throughout the province turns the inquiry into something akin to a jurisdiction dispute. He agreed with counsel for the Labourers that at the end of the day, the evidence would more likely than not be inconsistent. Matthews also adopts the position of the Labourers that it is relevant to know how *Matthews* performs its work throughout the province. On the other issue raised by the Labourers, Matthews takes the position that as the work which is the subject of the Carpenters' grievance is the construction of a storage tank, it is not within the Board's mandate to expand the sector deter-

mination to include the road work or the sewer and watermain work. However, evidence will be led on the other aspects of the project as are necessary to place the construction of the tank in context. In any event, counsel submitted that questions as to the admissibility of evidence which goes to aspects of this project other than the storage tank should be dealt with by the Board during the course of hearing the evidence.

10. Counsel for the Carpenters submitted that the Board should hear evidence as to how other general contractors in the construction industry perform this work. In his submission, other companies performing this work use ICI trades under the terms of ICI collective agreements. Although the industry practice is only one factor in determining which sector a project falls into, it is an important factor in this case. The Board was referred to the history of the introduction of "sectors" into the Act. In counsel's submission, the notion of sectors as adopted by Ontario's legislature was never tied to geographic areas, but was rooted in actual bargaining patterns at the time. It would be artificial to limit the scope of the Board's inquiry to the Board's geographic areas. It is especially inappropriate to limit the Board's inquiry in this manner, it is argued, where both trades are bound to province-wide collective agreements in the heavy engineering sector, and province-wide designations in the ICI sector. Although the Board has looked at local practice in a sector determination, it has done so where a collective agreement in issue was a local agreement only.

11. Counsel for the Carpenters also objects to the notion that the Board should look to the practice of using non-union trades, as part of industry practice. In his submission, in an employment context where sector is irrelevant, such practice cannot be of assistance to the Board in a sector determination.

12. In their arguments, the parties referred us to *Bird Construction Limited*, [1984] OLRB Rep. Dec. 1688; *Sikora Mechanical Ltd.*, [1982] OLRB Rep. June 941; *Sutherland -Schultz Limited*, [1988] OLRB Rep. June 632; *West York Construction Ltd.*, [1983] OLRB Rep. Dec. 2132; *Armbro Materials and Construction Limited*, [1987] OLRB Rep. July 948; *Steen Contractors Limited*, [1989] OLRB Rep. Nov. 1173; *Dufferin Construction Company*, Board File No. 1067-88-G, dated August 31, 1992, as yet unreported, and *Sword Contracting Limited*, [1985] OLRB Rep. May 743.

Decision of the Board

13. Section 153 of the Act states:

153. The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119.

14. The analysis of the Board in *Heavy Construction Association*, supra, has often been referred to in cases which have arisen under section 153. Although that case is an application for accreditation, the Board in the course of defining an appropriate unit of employers was required to determine whether certain work came within the heavy engineering sector. In *Dufferin Construction Company*, supra, the Board summarized some of the reasons in the above case as follows:

28. The Board in that decision, begins its analysis of the statutory definition of sector with its observation that there are three components to the definition. They are:

- (1) a sector is a *division* of the construction industry;
- (2) a prescription that divisions of the construction industry be determined by reference to *work characteristics*; and,

- (3) the inclusion of seven enumerated sectors "... as meanings of the term sector of the construction industry.":
- the ICI sector,
 - the residential sector,
 - the sewers and watermains sector,
 - the roads sector,
 - the heavy engineering sector,
 - the pipeline sector and,
 - the electrical power systems sector.

The Board concludes its analysis at paragraph 14 by identifying six examples of work characteristics to be used as criteria for distinguishing one of the seven enumerated sectors from the others. They are:

- (1) the type of problems to be dealt with at the job site;
- (2) the types of solutions resorted to at certain job sites;
- (3) the material used;
- (4) the relative importance of certain specifications;
- (5) the variety of skills and trades; and,
- (6) certain characteristic relations with employees.

The Board expressed the caution that these not be taken as an exhaustive list of work characteristics, but as examples of "... particular characteristics which differ between the various sectors enumerated in the Act".

15. The evidence which the Carpenters seek to introduce as to the practice of contractors throughout Ontario relates to factor (6) identified above, "certain characteristic relations with employees". It is submitted that this factor involves an analysis of how other contractors have performed the same work, specifically what trades are employed, and what collective agreement is applied.

16. At first glance, it is not obvious that the employment practices of contractors is a compelling factor in determining, for the purposes of the Act, the sector in which particular work lies. As with any statutory definition, parties are not generally free to construct their own meaning of the statute; ultimately, it is within the Board's hands to interpret the provisions of the Act in accordance with the language used and the surrounding legislative purpose. However, it would also be unwise for the Board to ignore existing, longstanding understandings in the construction industry about how work is to be performed. The direction in section 153 of the Act that sectors are to be distinguished according to their different "work characteristics" takes into account, in addition to a number of other factors, the fact that employment relations may be ordered in a different way in different sectors.

17. Thus, for example, the fact that a particular type of work is generally performed by contractors under the terms of a particular sector-specific agreement, *may* tell the Board something about the characteristics of the work which lend itself to this type of organization. The fact that a

contractor performs the work with its own forces, under the terms of collective agreements to which it is bound, or sublets part of the work to other contractors which perform the subcontract under the terms of agreements in the same sector, *may* again tell the Board something about the characteristics of the work. What are the employment demands of the work? Does it require a steady workforce over many months of a limited number of trades, or a changing complement of workers from day to day or week to week? This panel is not stating that the answers to these sorts of questions will play a *large* role in its determinations, but only indicating that "characteristic relations with employees" will be taken into account by the Board where it reveals something about the way in which work is organized in the different sectors.

18. The arguments that have been advanced by the parties opposing the introduction of such evidence on a province-wide basis are based on two grounds: efficiency of the hearing, and likely probative value. It is argued that the potential scope of such evidence is so broad that this panel will find itself engaged in interminable proceedings, only to find at the end of the day that there is no consistent general practice in the industry. The question is not free from doubt. The Board is always concerned that it does not unnecessarily complicate proceedings with evidence of doubtful value. It may be that in other cases, the inefficiency of such a hearing, coupled with other factors, will lead the Board to restrict evidence of employee relations to a geographic area. In the case before us, this panel of the Board is not convinced that it would be appropriate to do so. Unlike in some of the cases cited to us by the parties, there do not appear to be either longstanding locally-based industry organizations or collective agreements which provide the framework for the practice in the area.

19. Further, the parties who are before the Board have evidently anticipated that they may find themselves in a dispute over whether work performed by Matthews is in the ICI or another sector, and Matthews and the Carpenters have even provided for this event in an agreement. This is a *bona fide* dispute the determination of which will presumably guide the parties in their future relations. This employer apparently performs work throughout the province. The ICI agreement which the Carpenters seek to apply is province-wide. The agreement which the Labourers seek to apply is also province-wide. It appears to this panel that in order to give these parties the best answer to this dispute and in order that there be as much certainty as possible in resolving similar disputes which may arise between the parties in other areas of the province, the parties will be better served by a broader-based inquiry.

20. Accordingly, we have decided that the parties are free to rely on industry practice throughout the province in regards to employee relations on the type of work in dispute. We do not at this point rule on the admissibility of evidence concerning non-union employers.

21. It thus remains for us to define the work which is the subject of our sector determination. This does not appear to be a difficult question. The work which is the subject of the grievance relates to the installation of a large underground concrete storage tank associated with water treatment purposes. It is this work which the Carpenters claim to be covered by their ICI agreement. Indeed, the Carpenters do not dispute that *other* work performed by Matthews under the same construction contract, is work in the roads sector and the sewer and watermain sector. There is thus no dispute as to what sector this other work pertains to, and no reason for the Board to inquire into it.

22. This does not preclude the Labourers or Matthews from relying on the nature of the project as a whole, as the Labourers have indicated they intend to do, in support of their position on the sector issue.

23. In accordance with our findings, we direct the parties to file with the Board and

exchange detailed summaries of any evidence which they intend to call on the issue of employee relations with respect to the work in dispute, on or prior to October 30, 1992. The hearing of this matter will continue on Friday, November 6, 1992 and will take place at the Board's Offices, 6th Floor, 400 University Avenue, Toronto, Ontario at 9:30 a.m.

0874-92-R Kenneth W. Lyon, Applicant v. Retail, Wholesale and Department Store Union AFL:CIO:CLC, Respondent v. **Peacock Lumber Ltd.**, Intervener

Adjournment - Representation Vote - Termination - Following officer meeting and agreement to conduct vote on certain date, employer seeking adjournment of vote on ground that particular employee would be absent for medical reasons on the day of the vote - As alternative, employer requesting that employee be permitted to vote by proxy or to submit mail ballot or to cast ballot on return to work - Board denying employer requests - Representation vote resulting in tie - Board denying employer's renewed request that employee who missed vote be allowed to cast ballot - Board noting that parties had full opportunity for input into details of vote arrangements in advance of vote - Board explaining concerns surrounding proxy or mail balloting - Application dismissed

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *R. W. Pirrie* and *K. Davies*.

DECISION OF THE BOARD; October 19, 1992

1. This is an application under section 58 of the *Labour Relations Act* (the "Act") for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent. The Board by decision dated August 4, 1992 directed that a representation vote be conducted to determine whether the employees of the intervener Peacock Lumber Ltd. (the "Employer") in the bargaining unit wished to continue to be represented by the respondent union.

2. The parties met with a Labour Relations Officer on August 4, 1992, agreed to have the vote on August 27, 1992 and also agreed to September 3, 1992 as an alternate voting date. It is the Board's practice to arrange for the vote on the earliest date agreed to by the parties if possible, and that is what occurred in this case. Subsequent to the meeting with the Officer the employer received a request for vacation for medical reasons from one of the employees in the bargaining unit, Mr. Wayne Wood. The employer granted this request even though it meant that Mr. Wood would be out of the province on August 27, 1992, the date of the vote. The employer by letter dated August 21, 1992 to the Board's Manager of Field Services requested that the vote be adjourned. As the bargaining unit consists of only eleven individuals the intervener requested the adjournment to ensure that all of the employees entitled to vote could in fact cast ballots. In the alternative, the employer requested that Mr. Wood be permitted to vote either by proxy or to submit a ballot by mail. In the final alternative, the employer requested that the Board seal the ballot box and allow the employee in question Mr. Wood, to cast a ballot upon returning to work. The request to adjourn the vote and the request to allow Mr. Wood to vote by proxy or by mail were denied by the Board and the vote took place on August 27, 1992.

3. Immediately after the voting was concluded all three parties signed a consent and waiver form. That form reads as follows:

SCHEDULE "B"CONSENT AND WAIVER

FILE NO. 0874-92-R

BETWEEN:

Kenneth W. Lyon,

Applicant,

- and -

Retail, Wholesale and Department Store Union AFL:CIO:CLC,

Respondent,

- and -

Peacock Lumber Ltd.

Intervener.

WE the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on the 27th day of August, 1992.

WE the undersigned hereby agree that the following persons:

"K. Lyon"

are eligible for inclusion in the bargaining unit and that their ballots should be counted; and that the following persons:

should not be included in the bargaining unit and that their ballots should not be counted;

AND WE hereby waive objections as to the regularity and sufficiency of the balloting.

DATED AT Oshawa, Ontario on 27th day of August, 1992.

"Ken Lyon"

FOR THE APPLICANT

"J. Pound"

FOR THE RESPONDENT

"Terry Vail"

FOR THE INTERVENER

Therefore the employer agreed to count the ballots immediately and waived any objections to the regularity and sufficiency of the balloting. The parties also signed the form entitled Certification of Conduct of Election which states:

File No. 0874-92-R

BETWEEN:

Kenneth W. Lyon,

Applicant,

- and -

Retail, Wholesale and Department Store Union AFL:CIO:CLC,

Respondent,

- and -

Peacock Lumber Ltd.

Intervener.

CERTIFICATION OF CONDUCT OF ELECTION

DATE OF ELECTION - THURSDAY, AUGUST 27, 1992

PLACE OF ELECTION - Oshawa, Ontario

WE the undersigned, acted as scrutineers for the parties herein in the conduct of the balloting at the date and place above mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

"Ken Lyon"

For Applicant

"J. Pound"

For Respondent

"Terry Vail"

For Intervener

"S. Beth Wild"

Returning Officer

Ten persons cast ballots and the vote resulted in a five-five tie.

4. The Board is in receipt of a letter dated September 3, 1992 wherein the employer pursuant to the procedure set out in the Notice of Report of Returning Officer Before the Ontario Labour Relations Board (Form 70) has requested that the employee who missed the vote, Wayne Wood, be allowed to cast a ballot and that this ballot be included in the final count of the ballots.

5. Section 105(2)(f) of the Act and Rule 68 of the Board's Rules of Procedure make it clear that the timing of a representation vote falls within the Board's discretion. However, the Board generally through a Labour Relations Officer, consults with the parties and finalizes the voting arrangements based on the agreement of the parties. The parties are provided full opportunity for input into the details of the vote arrangements. It is they who are aware of the availability of employees and the nature of the employer's business. In this case the employer does not dispute that it concurred in the voting arrangements at the Officer's meeting.

6. In its letter dated August 21, 1992 the employer requested that Mr. Woods be allowed to vote by proxy. It has long been the practice of the Board to reject requests for votes by proxy. The dangers inherent in allowing proxy votes certainly outweigh any benefit to be derived from their use. A representation vote normally follows on the heels of vigorous campaigning by the various parties. The atmosphere in the workplace in the weeks immediately prior to the taking of a vote is often emotion charged, as those individuals who have determined the way their vote shall be cast, attempt to sway those who are undecided to their position. If the Board were to allow proxy votes we could potentially be setting up a scenario in which inappropriate pressure to cast their ballot in a certain fashion is brought to bear upon those individuals, who for whatever reason, will not be in attendance on the day of the vote. These observations should not be taken as the Board envisioning Machiavellian plots that do not exist and we do not suggest that improper conduct would inevitably occur. However, the potential for abuse would certainly exist.

7. Counsel for the respondent in his letter dated August 21, 1992 also requested that Mr. Wood be permitted to submit a ballot by mail. In the past, on a few occasions, the Board has allowed balloting by mail. The vast majority of these cases involve occasional teachers who do not have a permanent workplace. In the situation where voting has been conducted by mail, all the individuals entitled to vote have voted in this fashion. It would have been inappropriate in this case to allow one individual to cast a ballot by mail while all others voted in person. Balloting by mail raises many of the same concerns as voting by proxy. Workplace realities do not favour balloting by mail. Scrutineers would not be able to safeguard the process and voters could be inappropriately swayed. Votes work in part because of the secrecy of the ballot box. This is potentially lost in mail-ins.

8. The Board's practices as outlined in the previous paragraphs are not completely inviolate. If the parties agree to unusual voting arrangements (i.e. proxy voting, advance polls, voting by mail etc.), as a result of exceptional circumstances, the Board will consider and endeavour to accommodate such requests. We would hope that this type of emergency accommodation would be rare as it is incumbent on the parties to familiarize themselves as much as possible with the voting constituency to ensure that existing difficulties are taken into account before a vote date is agreed upon.

9. In the case before us immediately after the vote, the employer representative signed the Consent and Waiver form and the Certificate of Conduct of Election Form. The employer thereby agreed to an immediate counting of the ballots and waived any objections as to the voting process. In *Bermay Corporation Limited*, [1980] OLRB Rep. Feb. 166 the Board made the following observations concerning the implications of signing the consent and Waiver form:

• • •

11. Normally when all of the ballots are in the box following a representation vote the parties are given the opportunity of having the ballots counted immediately by the Board's Returning Officer. That way parties can learn right away what their collective bargaining situation will be as a result of the vote. A further advantage to an immediate count is that the result may render academic outstanding issues attaching to the application and eliminate the need for further litigation. The Board will not, however, count the ballots immediately after the vote unless it is clear that both parties are prepared to be bound by the result of the count. The Board therefore requires the parties to sign a "Consent and Waiver" form prior to counting the ballots. In this case the Consent and Waiver form presented to the parties states:

"We the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on the 17th day of September, 1979.

And we hereby waive any objections as to the regularity and sufficiency of the balloting.”

Prior to the counting of the ballots the above form was signed by Mr. Dorfman for the union and by Mr. Brisbin, the employer’s counsel, for the company.

12. The employer, by objecting now to the union’s scrutineer, is attempting to go back on that understanding. Having first waived any objection to the conduct of the vote it is not open to the employer to complain about the regularity of the balloting now having learned that the result of the vote was favourable to the union. That is precisely what the Consent and Waiver form is designed to prevent. If the Company had wished to pursue its objection it should have requested that the ballot box be sealed and the ballots not be counted pending a ruling on the merits of its complaint. Having failed to do so it may not now deny its counsel’s undertaking.

• • •

We would also draw the attention of the intervener to the Certification of Conduct of Election form which states that the parties agree that “all eligible voters were given the opportunity to cast their ballots in secret ...”. This form was signed by Terry Vail on behalf of the intervener. Therefore, on the facts before us, we decline to allow the employer to resurrect its request that Mr. Wayne Wood be allowed to vote.

10. The Board is also in receipt of correspondence dated September 23, 1992 wherein counsel for the employer raises a challenge concerning the jurisdiction of the Board’s Manager of Field Services to make a decision with regard to whether or not the representation vote should or should not have been adjourned. Whether or not the Manager did or did not have the jurisdiction to make the decision he did is academic at this point. The decision to deny the adjournment has been reviewed by a panel of the Board. After carefully considering counsel for the employers’ submissions, for the reasons set out in this decision we see no basis for interfering with the Manager’s decision not to adjourn the vote.

11. The Board therefore, for the reasons outlined, confirms that Mr. Wayne Wood was not entitled to cast a vote by proxy or by mail prior to the vote taking place, nor is he entitled to do so now. The respondent’s request that he be allowed to do so is hereby denied.

12. On the taking of the representation vote, not more than fifty per cent of the ballots cast were cast in opposition to the trade union. This application is therefore dismissed.

1535-92-R; 1602-92-R United Food & Commercial Workers International Union, Local 175, Applicant v. Price Club St. Laurent Inc. c.o.b. as **Price Club Westminster**, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Union making separate applications for full-time and part-time employees - Employer seeking to include and union seeking to exclude office and sales staff from proposed units - Board accepting union's position regarding exclusion of office and sales staff, but not accepting in totality its position concerning the scope of that exclusion - Board declining to depart from usual "4/7" test concerning how part-time or full-time status of employees should be determined

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *Douglas J. Wray*, *Vincent Gentile* and *Rick Wauhkonen* for the applicant; *E. L. Stringer*, *Q.C.*, *J. Third* and *Brian Loewen* for the respondent; *A. Paul Davis* for the objectors.

DECISION OF THE BOARD; October 15, 1992

1. The name of the respondent is amended to read: "Price Club St. Laurent Inc. c.o.b. as Price Club Westminster". (For ease of reference, the respondent is also referred to as the "Company" in this decision).
2. These are two applications for certification. File No. 1535-92-R pertains to full-time employees, while File No. 1602-92-R pertains to part-time employees and students. In view of the issues that were identified as being in dispute when the parties' representatives met with a Board Officer, another panel of the Board appointed a Labour Relations Officer to inquire into and report to the Board concerning the lists and composition of the bargaining units, and the community of interest between "office and sales staff" and the employees in the bargaining units proposed by the applicant (also referred to as the "Union" in this decision).
3. On October 9, 1992, prior to hearing the parties' submissions based upon the contents of the Labour Relations Officer's Report (and the exhibits entered during the course of his inquiry), the Board unanimously ruled that the geographic scope of the bargaining units should be "the Township of Westminster", after hearing submissions on that matter. In that oral ruling, the Board noted that it would be open to the applicant to apply for reconsideration if either or both of these applications succeed and the portion of the Township in which the Company's premises are situated is subsequently annexed by the City of London, as the Union anticipates may occur.
4. The parts of the bargaining unit descriptions which are not in dispute, combined with the above ruling, yield the following:

Bargaining Unit #1

all employees of the respondent in the Township of Westminster, save and except supervisors, persons above the rank of supervisor, security guards, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.

Bargaining Unit #2

all employees of the respondent in the Township of Westminster regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and security guards.

Each of the units applied for by the Union also excludes "office and sales staff". It is the respondent's position that office and sales staff share a community of interest with the employees in the bargaining units proposed by the Union, and that their exclusion would cause serious labour relations problems for the Company. There is also a dispute between the applicant and the respondent with respect to which classifications fall within the ambit of "office and sales staff". Both agree that office and sales staff includes N.S.F. clerks, E.D.P. operators, sales auditors, and receptionist. The Union contends that the only other classifications included in office and sales staff are membership clerks, vault clerks, and receiving secretary, while the respondent contends that the only other classifications included are inventory auditors, electronic sales, and tire sales.

5. As submitted by Union counsel and acknowledged by Company counsel, the Board's task in cases of this type is not to define the more or the most appropriate bargaining unit; the Act only requires that the unit determined by the Board be appropriate. (See, for example, *Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430, at paragraphs 20-22.) Although the Board is generally averse to certifying employee groups where the result is undue fragmentation, the Board must also be cautious that its determination of what is appropriate does not unduly impede the freedoms guaranteed by section 3 of the Act. (See, for example, *Flying Dutchman Hotel*, [1984] OLRB Rep. Dec. 1718.) In recent years, the approach which the Board has generally applied in making such determinations has come to be framed in the form of the following question: Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer? See *The Hospital for Sick Children*, [1985] OLRB Feb. 266, at paragraph 21. In that leading case, the Board also expressly recognized that in some situations there may be more than one unit that is appropriate:

.... In any given situation there may not be only one uniquely appropriate bargaining unit. Quite the contrary. As we have already noted, the institution of collective bargaining has shown itself capable of accommodating a variety of bargaining structures, even in broadly similar circumstances, and in particular situations there may be several alternative and equally appropriate ways of framing the bargaining unit description. There may be varying degrees of "appropriateness", with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate. For example, a single plant unit may be appropriate but so may a multi-plant unit. Full time and part time employees can be segregated, but there are many situations where they have not been....

6. The present case is an instance of exactly that situation. While the bargaining units proposed by the respondent might well be appropriate for collective bargaining (by analogy to the approach adopted by the Board in *Motor Coach Industries Limited*, [1992] OLRB Rep. June 744), so too are the bargaining units proposed by the applicant. Although the exclusion of office and sales staff could possibly result in some limitations on the respondent's current practices in respect of job posting and temporary transfers, the extent of such limitations, if any, can appropriately be determined through the process of collective bargaining if the applicant is successful in obtaining bargaining rights. Moreover, we are satisfied that any labour relations problems which might result from our acceptance of the units sought by the Union would not be sufficiently serious to warrant the rejection of those units. Thus, in the circumstances of this case, we are satisfied that each of the bargaining units proposed by the Union encompasses a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the Company.

7. Although we have accepted the Union's position regarding the exclusion of office and sales staff from the bargaining units, we do not accept in totality its position concerning the scope of that exclusion. Given the nature of their duties and responsibilities and the type of work areas in which they perform them, we agree that the respondent's vault clerks and receiving secretary fall

within the scope of “office staff”, along with the N.S.F. clerks, E.D.P. operators, sales auditors, and receptionist. Inventory auditors have desks in the respondent’s mezzanine level office, but spend the majority of their time counting merchandise on the warehouse floor, where they interact with fork-lift drivers (who help them to access some of the merchandise to be counted), stockers, and a number of other employees who (for the reasons set forth below) we are satisfied should also be included in the bargaining unit, namely, tire sales, electronic sales, and membership clerks (who assist them in locating merchandise). Thus, although inventory auditors spend some of their time in the office, the functions which they perform on the warehouse floor and the extent of their interaction with other classifications included in the bargaining units lead the Board to accept the Union’s contention that they are not “office and sales staff”, and should not be excluded from the bargaining units. However, we do not find merit in the Union’s contention that membership clerks should be excluded from the bargaining units. With the exception of the two membership clerks (Paul Davis and Jane Whiting) who spend the majority of their time away from the respondent’s premises visiting various businesses to solicit new members, and who are conceded by the Company to be “sales staff”, we have concluded that membership clerks do not fall within the purview of the “office and sales staff” exclusion. Although their duties and responsibilities include providing information about the respondent’s operations to interested visitors, and signing up people who attend at the respondent’s premises to become members, they also operate a cash register, provide information to members, handle their complaints and merchandise returns, give them refunds where appropriate, handle merchandise pickup on security items, and perform “door auditing” functions (by standing at the entrance to the warehouse to ensure that the people entering are members and that no mistakes have been made on the sales receipts of members leaving the warehouse with purchases). They are also called upon from time to time to “work on the front end” when additional personnel are needed to assist on the cash registers to accommodate a large number of members waiting in line to pay for their purchases. Thus, on the totality of the evidence, we have concluded that membership clerks (other than those who spend the majority of their time away from the respondent’s premises) are neither sales nor office staff, and that they share a greater community of interest with employees in the bargaining units than with the persons who fall within the scope of that exclusion. (In view of our conclusion in that regard, it is unnecessary for the Board to deal with the issue of whether the employees referred to on the respondent’s lists as “door auditors” had been reclassified as membership clerks prior to the date of the application, as they are included in the bargaining units either way.)

8. As noted above, the respondent contends that the persons classified as “electronic sales” and “tire sales” should also be excluded from the bargaining unit. The employees classified as “electronic sales” work in the front area of the warehouse floor where the computers, sound systems, televisions, radios, and various other electronic items available for purchase from the respondent are kept. They stock items in the electronic sales area and provide members with product knowledge concerning those products. Employees classified as “tire sales” perform similar functions in their area in the back of the centre section of the warehouse. Although the product knowledge provided by persons in these two classifications undoubtedly assists members in selecting electronic equipment and tires, the duties and responsibilities of those positions are very similar to those of the stockers who are undisputedly included in the bargaining units. Thus, despite their job titles, the evidence does not indicate that those jobs involve a sufficient sales component to warrant their exclusion from the bargaining unit as “sales staff”.

9. For the foregoing reasons, the Board finds that the following constitute units of employees of the respondent appropriate for collective bargaining:

Bargaining Unit #1

all employees of the respondent in the Township of Westminster, save and except supervisors,

persons above the rank of supervisor, security guards, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.

Bargaining Unit #2

all employees of the respondent in the Township of Westminster regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, security guards, and office and sales staff.

10. For purposes of clarity, the Board notes that “office and sales staff” includes N.S.F. clerks, E.D.P. operators, sales auditors, vault clerks, receptionist, receiving secretary, and membership clerks who spend the majority of their time away from the respondent’s premises soliciting new members, but does not include inventory auditors, electronic sales, tire sales, and the respondent’s other membership clerks. Having regard to the agreement of the parties, the Board further notes for purposes of clarity that the respondent’s personnel clerk and payroll clerk are excluded from the bargaining units on the basis that they are either office and sales staff or are employed in a confidential capacity in matters relating to labour relations (within the meaning of section 1(3)(b) of the *Labour Relations Act*).

11. There is also a dispute between the applicant and the respondent concerning how the part-time or full-time status of the employees affected by these applications should be determined. Union counsel contends that the Board’s usual “4/7” test is not appropriate as the applications were preceded by summer weeks in which counsel suggests that some employees were working extra hours to cover for others who were away on vacation. It is the Union’s position that the Board should either consider as full-time those persons whom the Company classifies as full-time, or find to be full-time only those employees who worked in excess of twenty-four hours per week in each of the four weeks preceding the certification applications.

12. The Company classifies as full-time employees only those who are consistently scheduled to work thirty-seven and a half hours per week. As contended by counsel for the respondent, having applied for and agreed to bargaining unit descriptions which incorporate the Board’s usual phraseology of “persons regularly employed for not more than twenty-four hours per week” to describe part-time employees, it is not open to the Union to resile from that part of the agreed upon bargaining unit descriptions by requesting the Board to substitute a different cut-off point. (See, generally, *Fort Erie Duty Free Shoppe Inc.*, [1991] OLRB Rep. Nov. 1268, at paragraph 11, and *Cor Jesu Re-education Centre of Timmins Inc.*, [1992] OLRB Rep. March 298, at paragraph 7.)

13. In describing the approach which the Board has generally adopted in distinguishing between full-time and part-time employees, the Board wrote as follows in *Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116:

5. The applicant submits that in the special circumstances of this case the Board should depart from its normal practice in determining which employees are full-time. Generally the Board looks to the period of seven weeks immediately prior to the date of application as a representative period in which to assess the number of hours worked by employees. If during four or more of the seven weeks examined a person works for more than 24 hours per week the employee falls within a bargaining unit of full-time employees. The seven weeks guideline is, of course, a procedural construct, arising from the Board’s experience, adopted in certification proceedings to facilitate and give some predictability to resolving the list of employees in the full-time and part-time bargaining units. By adopting this practice the Board has sought to make it easier for the parties appearing before it to reach their own agreement on the status of employees as full-time and part-time, and for employees and their unions to gear their organizing campaigns

accordingly. As the Board put it in *Sydenham District Hospital*, [1967] OLRB Rep. May 135 at 137:

“The fixing of a reasonable firm period to be considered by the Board in making such a determination has the advantage of consistency which would permit the parties to know in advance what persons are to be considered.”

• • •

7. The seven week guideline cannot, of course, be applied in an arbitrary way without regard to the case before the Board. But with certification applications now numbering over a thousand each year there is an obvious need for procedural certainty and predictability to serve the expectations of the labour relations community. There is, therefore, a substantial onus on any party requesting that the Board depart from procedures like the seven week guideline that are known, accepted and relied on by unions and employers alike.

8. Having regard to the merits of this case the Board is satisfied that it should not depart from its standard method of computing the lists of full-time and part-time employees. Vacation and holiday periods can influence the composition of a bargaining unit in many applications for certification. The hiring of employees on short term as replacements and the transfer of employees within an employer's operation are common devices to maintain or adjust production during these periods. Coming as they do at regular and predictable times, these are the kinds of factors which trade unions can and do take in consideration in the planning of their organizing campaigns. The Board therefore declines to depart from the application of the seven weeks guideline in the circumstances of this case.

Similarly, nothing in the circumstances of the applications currently before us (which the Union chose to file on August 26 and September 4, 1992) warrants a departure from the Board's usual approach, as described in that decision. (See also *Elizabeth Frey Society of Ottawa*, [1985] OLRB Rep. July 1026, at paragraph 26.)

14. The respondent has requested that D. Racinkas be added to its list in respect of File No. 1535-92-R on the grounds that this person's name was inadvertently omitted from the list. Having regard to the fact that the respondent filed a sample signature for Ms. Racinkas by the terminal date, and to the fact that the record check conducted by the Labour Relations Officer confirmed that she should be included in the full-time bargaining unit for purposes of the count, we are prepared to grant that request in the circumstances of this case.

15. Having regard to the agreement of the parties, B. Telfer and D. Freitas are hereby added to Schedule “A” of the employer's list in respect of File No. 1535-92-R. As regards the applicant's requested addition of Ken Darnell, who was discharged by the respondent prior to the filing of that application, it is common ground among the parties that if the Union's section 91 complaint (File No. 1467-92-U) regarding Mr. Darnell's discharge results in his reinstatement, his name would be added to the list. Thus, the resolution of that requested addition must await the disposition of that complaint. (The applicant's request that F. Carrado, C. Thompson, M. Vergilio, J. Stenabourgh, and S. Morgan be added to the (full-time) list was abandoned at the hearing of this matter, as was the objectors' request for the addition of Terry Axford.) Since M. Jons' return to work on September 21, 1992 places him within the ambit of the Board's “30/30 rule”, he is included in the full-time bargaining unit for purposes of the count.

16. In respect of bargaining unit #1, the applicant has filed membership evidence for 55 of the 101 employees currently included on the respondent's list for purposes of the count (i.e., not more than 55%). Thus, unless the Union's application for certification under section 8 of the Act is granted, the Union will be in a vote position regardless of the disposition of its section 91 com-

plaint in respect of Mr. Darnell's discharge, and regardless of whether the petitions filed by the objectors are voluntary or involuntary.

17. In respect of bargaining unit #2, the Union has filed membership evidence for less than forty-five percent of the employees in the bargaining unit. Thus, the application in respect of that unit will be dismissed unless the Union's application for certification under section 8 is granted.

18. As previously scheduled, the hearing of these matters will continue before this panel of the Board on October 21, 1992, at which time the Board will hear submissions concerning the procedure to be adopted in hearing the balance of these applications, and the Union's two section 91 complaints (File Nos. 1467-92-U and 1615-92-U) which the parties have agreed should be heard together with the certification applications.

0440-92-R Practical Nurses Federation of Ont., Applicant v. Strathroy Middlesex General Hospital, Respondent

Bargaining Unit - Certification - Board reviewing and distinguishing *Mississauga Hospital* and *South Muskoka Memorial Hospital* cases - Board finding union's proposed bargaining unit, composed solely of those employed as Registered or Graduate Registered Nursing Assistants, not appropriate - Application dismissed

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *F. B. Reaume* and *H. Peacock*.

APPEARANCES: *Michael A. Church*, *Denis Ellickson*, *Gail Bennett* and *Janet Hedmen* for the applicant; *Allan Shakes* and *Glenna Houliston* for the respondent.

DECISION OF LOUISA M. DAVIE, VICE-CHAIR, AND BOARD MEMBER F. B. REAUME;
October 30, 1992

1. This is an application for certification. For ease of reference the two parties to this application will be referred to as the "trade union" or "PNFO", and "the employer" or "the Hospital".

2. Prior to the hearing in this matter the parties reached agreement on all matters in dispute between them with the exception of the description of the bargaining unit. The parties have agreed that if the applicant's proposed bargaining unit is found to be appropriate, that bargaining unit would include both full-time and part-time staff. Having regard to that agreement, and the parties further agreement with respect to the employees on the list, the parties were advised by the Labour Relations Officer that there were 52 employees in the bargaining unit for purposes of the count.

3. The only issue which remains outstanding is the appropriateness of the bargaining unit sought by the trade union. The PNFO desires to represent:

all employees employed as registered or graduate nursing assistants by the Strathroy Middlesex General Hospital in the Town of Strathroy, save and except head nurse and persons above the rank of head nurse.

This will be referred to as the RNA only unit.

4. The Hospital opposes this description of the bargaining unit. It asserts that it is not appropriate to restrict the bargaining unit to registered and graduate nursing assistants (RNA's). In these proceedings it has argued in the alternative that the appropriate bargaining unit is either a unit which comprises both RNA's and a number of other "service" employees such as ward clerks, maintenance employees, housekeeping aides, etc. (the "service unit" option); or alternatively a unit which comprises both RNA's and a number of other "paramedical" employees such as occupational therapists, physiotherapists, respiratory technologists, laboratory technicians etc. (the "paramedical unit" option); or alternatively a unit which comprises both RNA's and registered and graduate nurses (the "nursing unit" option).

5. The trade union has only recently been found to be a trade union within the meaning of section 1(1) of the *Labour Relations Act* ("the Act"). (See *The Mississauga Hospital*, [1991] OLRB Rep. Dec. 1380 (hereinafter referred to as "*Mississauga Hospital*"). Its history as a trade union and its relationship to the Ontario Association of Registered Nursing Assistants ("OARNA") was detailed in *Mississauga Hospital*, *supra*, and need not be repeated here. Suffice it to say that it is a trade union which seeks to represent in collective bargaining *primarily* the interests of RNA's. The Board in *Mississauga Hospital* found at paragraph 15 of its decision that the PNFO was created in February, 1991 *inter alia* to meet "the RNA's appetite for collective bargaining outside the service unit and through the auspices of their own trade union". The Board also found that membership in the PNFO was *not* restricted to RNA's stating at paragraph 14 that the PNFO "... is a newly created trade union organized to represent all registered practical nurses or registered nursing assistants and other allied personnel eligible for collective bargaining in Ontario".

6. Although membership in the PNFO is not restricted to RNA's, since *Mississauga Hospital* the PNFO has applied for and been granted a number of certificates in which the Board has accepted the agreement of the parties to restrict the bargaining unit to RNA's. Each of those certificates was granted without a hearing. Since the *Mississauga Hospital* decision there has only been one other case in which the appropriateness of an RNA only bargaining unit has been litigated (see the decision of the Board in *South Muskoka Memorial Hospital*, [1992] OLRB Rep. April 520 (hereinafter referred to as "*South Muskoka*"). This then is the second occasion within recent times in which the Board has been required to consider further the decision of the Board that issued in *Mississauga Hospital* and adjudicate upon the issue. Prior to the decisions in *Mississauga Hospital* and *South Muskoka* the Board had historically treated RNA's as being included in a service bargaining unit (see most recently *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266). Each of these decisions and the concepts and principles enunciated therein figured prominently in the submissions of both parties and will be referred to in greater detail.

7. The respondent employer is a relatively small hospital with a total employee complement of approximately 338 persons. The parties are agreed that approximately 286 of these persons are eligible to be represented by a bargaining agent and bargain collectively pursuant to the provisions of the Act. It was further agreed that those eligible to participate in the collective bargaining process can be broadly grouped as follows: 42 office and clerical employees, 29 paramedical employees, 49 service employees, 64 registered or graduate nursing assistants, and 102 registered and graduate nurses.

8. As of the date of the making of this application all of the employees of the respondent were unorganized.

9. The parties did not call *viva voce* evidence in this case as there was little dispute between them about the factual context within which the case must be decided. There was dis-

agreement about the characterization to be placed on certain facts and the significance or weight to be attached to various facts.

Submissions of the Trade Union

10. The applicant relied primarily on the decisions of the Board in *Mississauga Hospital* and *South Muskoka* and the arguments advanced by the PNFO in those cases. Counsel relied on the evolution of the qualifications and responsibilities of the RNA set out in those decisions, the RNA's role in providing direct nursing care to patients, the RNA's community of interest within their own group and with the nursing department, and the RNA's right to organize and be represented by the trade union of their own choice in support of the trade union's position that an RNA only unit is appropriate in these circumstances. It was stated that the submissions which the trade union made to the Board in *South Muskoka* and *Mississauga Hospital* were equally applicable to the case before us. As counsel so succinctly put it, "this was our argument then and this is our argument now."

11. In keeping with this theme the trade union asserted that given the jurisprudence of the Board in the past year, the employer must explain why this Hospital is any different from the hospitals in *Mississauga Hospital* and *South Muskoka* so that the proposed unit is not appropriate. Similarly, the PNFO proposed unit was variously characterized as "their RNA unit" or "its standard unit" together with the assertion that the unit had, from the trade union's perspective, become standard. In this regard it was asserted that the Board's precedents in *South Muskoka* and *Mississauga Hospital* together with the various agreed upon RNA only bargaining unit certificates assisted the PNFO in establishing the appropriateness of the bargaining unit sought in this case.

12. Factually the trade union argued that there was little to distinguish this Hospital and this case from the facts found in *Mississauga Hospital* and *South Muskoka*. The RNA's are part of the nursing department and wear a name tag stating "nursing department". The RNA's administer direct nursing care under the supervision of a medical practitioner and/or a registered nurse. Like RN's, and unlike other staff at the Hospital, the RNA's cover the Hospital twenty-four hours a day, seven days a week. Unlike "service" employees RNA's must come to the job as "qualified" and "certified" and can't become qualified through on the job training.

13. With the exception of one operating room (O.R.) technician there are no RNA's employed who are not certified and registered by reason of having completed the appropriate college courses. Generally the operating room technicians are RNA qualified and RNA certification is currently a required qualification for that position. The PNFO seeks to represent those O.R. technicians who are RNA qualified. It appears however that it does not seek to represent O.R. technicians who are *not* RNA qualified. At the time of the application there was one operating room technician who had been "grandfathered" and who was not a registered or graduate nursing assistant. This person is expected to retire shortly. Her name does not appear on the list of employees agreed upon by the parties. From the trade union's perspective it does not seek to represent this person as the PNFO does not seek to represent "operating room technicians". The PNFO argues that it does not seek to represent RNA's *in* the O.R. technician position. Rather it seeks to represent RNA's "employed as" or performing the work functions of an RNA. The applicant argues that an O.R. technician performs such work functions and falls within the bargaining unit proposed if she is RNA qualified.

14. Similarly, the trade union also stated that although there are some employees in the Hospital who hold a RNA certificate who are employed in "non-RNA" capacities, (some in addition to their employment as a part-time RNA) the trade union does not seek to represent RNA's not "employed as" RNA's. It does not seek to represent RNA's (that is to say persons who are

qualified and certified as RNA's) when those persons perform work outside the proposed bargaining unit i.e. as ward clerks. Thus for example it intends to treat those RNA's who perform both RNA work within the proposed bargaining unit and other work outside it as any other part-time employee. The trade union would represent the RNA only when and if the person worked within the RNA classification. In this regard it was submitted that it is significant that although there is movement of employees *out* of the RNA unit (as RNA's obtain either temporary or permanent full-time or part-time positions as ward clerks, activation therapy assistants, porters etc.), there is no similar movement *into* the RNA unit.

15. Finally the applicant noted the proposed bargaining unit had numerical viability insofar as it comprises in excess of fifty persons. It was submitted that a homogeneous RNA group of this size could and should be permitted to bargain as a unit and be represented by the bargaining agent of its choice. Counsel for the PNFO argued that although employees within the group perhaps had a community of interest with the registered nurses who also provided direct patient care, that does not detract from the fact that the unit proposed in and of itself is appropriate and viable. Reference was made to the fact that the registered nurses are typically and historically represented by their own bargaining agent, the Ontario Nurses' Association ("ONA") in a registered nurses only bargaining unit. The ONA does not seek to represent and does not accept into membership persons other than registered and graduate nurses. In addition it was asserted that the placement of RNA's and RN's in the same unit could result in conflicts as statutory provisions and the College of Nurses and its published Standards of Nursing Practice indicate that the registered nurses have supervisory responsibility with respect to RNA work.

Submissions of the Employer

16. In its arguments the respondent also referred to both *Mississauga Hospital* and *South Muskoka* asserting that the facts of this case were distinguishable. It was disputed that the ratio of those decisions indicated that an RNA only unit was appropriate. Instead, the employer submitted that these cases stood for no more than the proposition that an RNA only unit was appropriate given the specific facts and circumstances that existed in each of those cases, *but* that in different facts and circumstances a unit of RNA's together with some other grouping of employees might be appropriate. It was argued that the facts and circumstances of this case were different and that such other grouping was appropriate.

17. The employer submitted that the onus was on the PNFO to show the proposed bargaining unit was appropriate. It was argued that this onus was not shifted merely because recent jurisprudence of the Board did not discount the possibility that an RNA only unit *could* be appropriate in particular circumstances. From this Hospital employer's perspective both *Mississauga Hospital* and *South Muskoka* were cases which departed from existing jurisprudence and were "fact specific".

18. The focus of the employer's submissions revolved around the issue of undue fragmentation identified in both *Mississauga Hospital* and *South Muskoka*. It was asserted that to grant an RNA only unit in these circumstances where no other employees of the Hospital were yet organized was to at a minimum increase by one the number of bargaining units typically or historically found in hospitals. Counsel submitted that in a hospital setting prior to *Mississauga Hospital* and *South Muskoka* and at least since the Board's decision in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, the Board had with some consistency recognized bargaining units consisting of:

- a) registered and graduate nurses
- b) paramedical employees
- c) all service employees (including RNA's)

- d) office and clerical employees, and
- e) where appropriate stationary engineers.

19. Counsel for the Hospital argued that due to the unique nature of institutions within the health care sector and the many “professional” or “specialized skills” employees working within the health care sector, there had developed a proliferation of small bargaining units of employees with specialized skills or departmental focus. The Johnson Commission report of 1974 identified a number of problems in the health care sector as a result (at least in part) of that development. In 1976 the Board itself sought to bring some stability or rationalization to the structure of bargaining units in the health care sector in its decision in *Stratford General Hospital*. The respondent argued that to find as appropriate an RNA only bargaining unit in an otherwise unorganized hospital would increase the very fragmentation sought to be avoided in *Stratford General Hospital* and such subsequent decisions of the Board as the *Hospital for Sick Children, supra*. As counsel stated “the *Stratford General Hospital* decision is being undone” if the Board in this case were to find an RNA only unit to be appropriate.

20. With respect to the issue of fragmentation the Hospital asserted a number of labour relations problems or concerns caused when there is a multiplicity of smaller units. These included the added costs of bargaining with a number of smaller units, the increased likelihood of jurisdictional disputes, the restrictions placed on employee mobility within the Hospital as movement between bargaining units and bargaining agents becomes restricted, the increased likelihood of competition between bargaining units including both competition between bargaining units within the Hospital and the potential competition and consequent “leap frogging” between RNA only units at this and other hospitals and the “service” units at other hospitals which include RNA’s etc.

21. Factually the respondent referred to particular facts and circumstances which it was submitted distinguished this case from the *South Muskoka* and *Mississauga Hospital* decisions, and in any event supported a much broader bargaining unit rather than the one sought by the PNFO. Counsel for the employer asserted that unlike the situation in *Mississauga Hospital*, this Hospital had not done anything to set the RNA’s apart as a separate or distinct group. Rather there is a single staff association at the Hospital which represents all staff. This association has an executive and consists of all the different parts of the Hospital including RNA’s. Representatives of management are not part of that association. The association regularly discusses matters relating to labour relations and personnel with management including for example the Hospital’s policy with respect to bereavement leave, payment in lieu of benefits for part-time employees, part-time vacation policies etc. Similarly, and unlike the case in *Muskoka Hospital* the Hospital here has not set the RNA’s apart by, for example, deducting association dues (OARNA dues) for its RNA’s notwithstanding that a request to do so has been made.

22. We were also referred to various occasions in which RNA qualified employees successfully applied for temporary or permanent full or part-time positions outside the proposed bargaining unit. Thus, for example, one RNA had been given the option of electing to be laid off or accepting a relief “porter” position. She elected to work in the porter position. At the time of the application that individual RNA was therefore employed as a porter. We note that the name of this RNA certified “porter” appears on the agreed upon list of employees.

23. At the Hospital there have also been a number of instances in which RNA’s moved to ward clerk positions (for reasons of health, work related injuries or personal preference) or were hired as part-time relief to provide back-up for the regular part-time ward clerk. At the time of the application there was one RNA qualified employee who *in addition* to her work as a part-time RNA also worked as a ward clerk on a part-time basis. This was not the first occasion that this had

occurred, and other examples in which RNA's successfully applied for other or additional part-time work outside the proposed bargaining unit such as a storekeeper, or part-time activation therapy assistant were provided. It was argued that this movement of employees from the bargaining unit pointed to a community of interest with "some other area".

24. With respect to salary and benefits and other terms and conditions of employment the employer "looks to" the centrally bargained S.E.I.U. and C.U.P.E. "service agreements" with other hospitals as its benchmark. Similarly, it looks to the centrally bargained ONA agreement as a benchmark for its registered and graduate nurses and the OPSEU paramedical agreement for the paramedical employees. There does not however appear to be any consistency in grouping the various classifications at the Hospital for purposes of determining benefit levels. For example, for purposes of weekend and shift premiums all employees except the registered nurses receive the same premium amounts. All employees including the registered nurses receive the same insurance coverage and pay the same proportionate percentage amount for such insurance coverage. For purposes of vacation entitlement on the other hand the RNA's entitlement is the same as the "service" and "clerical" employees, and is different from the registered nurses and paramedical employees.

25. The Hospital made extensive submissions about the interaction of the RNA's with other employees who assist in some manner in providing medical care or services to the patients at the Hospital. These ranged from the RNA's interaction with housekeeping staff who clean a patient's room, the dietary staff who deliver food trays distributed to patients, the physiotherapist who attends patients on the floor and the registered nurses with whom the RNA's work and from whom the RNA's may receive directions about patient care. We need not detail the interaction between various employee classifications at the Hospital. We note simply that employees at this Hospital appear to perform the tasks which one would typically expect an employee in those classifications in a hospital to do.

Decision

26. We accept that all hospital employees are "involved" in the delivery of patient care. Notwithstanding that fact however, the employees within the various classifications referred to by counsel do not perform the same or similar tasks. The employees exhibit varying skills, have different education levels, have varying and different lines of authority within the Hospital's organization and as has already been noted work pursuant to varying conditions of employment in terms of hours, benefits, etc. As a result, we are not persuaded that the interaction which RNA's have with other employees at the Hospital to which the employer referred is any more helpful in resolving the issues placed before us than is the trade union's argument that the "status" of the RNA's favours a separate and distinct bargaining unit. The extreme positions of the parties with respect to these two matters merely highlight the typical tensions in cases in which the appropriateness of the bargaining unit is litigated. The conflict between the employer's concern that a work place not be unduly fragmented and the trade union's concern that the rights to employee self-determination in collective bargaining not be unduly impeded, must always be balanced. It is these concerns which underlie the Board's determination of an appropriate bargaining unit. In this regard we refer to the extensive analysis of the objectives, conflicts and tensions which must be considered in determining the appropriate bargaining unit contained in *Mississauga Hospital*, and the *Hospital for Sick Children*, *supra* and *Stratford General Hospital* [1976] OLRB Rep. Sept. 459.

27. In the case before us, in addition to the underlying conflict between the parties which pits the right to self-determination against the desire to avoid fragmentation, there is an added tension. That tension focuses on the different interpretations and weight which the parties have attrib-

uted to the Board's decisions in *Mississauga Hospital* and *South Muskoka*. Do the ratios of those decisions support the trade union's submissions that an RNA only unit is appropriate and that therefore the Hospital has an "onus" and is required to show why its circumstances are different and an RNA only unit is *not* appropriate in the present circumstances? Or do the ratios of the decisions support the employer's position that the cases were "fact specific" and that therefore the trade union has an "onus" and is required to show that the circumstances here similarly warrant a departure from the Board's previously established practice of not granting an RNA only unit.

28. We do not find it particularly helpful to cast the issues with respect to the appropriateness of a bargaining unit in terms of "onus". Pursuant to section 6 of the Act the Board is obliged to find a unit that is "appropriate". That issue is rarely resolved on the basis of which party has the "onus" of proving something. Regardless of any question of "onus" or the "interpretation" which each of these parties seek to place on *Mississauga Hospital* and *South Muskoka* the test to determine whether a proposed bargaining unit is appropriate continues to be one which focuses upon the viability of the collective bargaining structure. That principle was succinctly enunciated in the *Hospital for Sick Children*, *supra*, where the Board framed the approach which the Board has generally applied in recent years in the form of the following question:

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

29. The decisions in *Mississauga Hospital* and *South Muskoka* neither add to nor detract from that proposition. The approach articulated in the form of the relatively simple question asked in the *Hospital for Sick Children* has not changed as a result of recent cases in which it was determined or agreed that the PNFO can be certified for an RNA only unit.

30. *Mississauga Hospital* explicitly referred to the *Hospital for Sick Children*. After quoting this passage the Board went on to note that the issue of "undue fragmentation" could relate to either "the viability of the proposed bargaining unit or to whether serious labour relations problems will be created for an employer". It then determined the appropriateness of the proposed unit with reference to this objective of a viable collective bargaining structure stating:

47. The bargaining unit sought by the applicant here clearly includes a group of employees with a sufficiently coherent community of interest that they can bargain together and do so on a viable basis. The applicant seeks to represent a group of employees totalling approximately 165 all of whom have similar skills and perform similar functions and enjoy similar terms and conditions of employment. *This is a largely unorganized hospital wherein the employer already recognizes and has a history of dealing separately with this same group of employees in a less formalized manner but for purposes very similar to those in collective bargaining.* While we might prefer that the RNA's, if opposed to being included in a service unit, be included in a bargaining unit with either RN's or paramedical employees, on balance, we are not persuaded, notwithstanding the Board's earlier decisions, that there is potential for serious labour relations problems in *this* institution, provided the bargaining unit is described as including those persons employed as registered or graduate nursing assistants. While we have some reservations about overlaps in function between RNA's and orderlies we are not persuaded that it is of a sufficient degree so as to overcome the otherwise viable nature of the bargaining unit. Three of seven orderlies are employed in the emergency department where no RNA's are employed (nor is that contemplated). The employer will still have to deal with the potential greater difficulty of overlaps in function between the RNA's and RN's. That potential currently exists throughout the health care sector. This conclusion may well be different in an institution where there exists a large complement of employees in classifications whose functions overlap. However that is not the evidence before us.

48. *In coming to this conclusion we do not intend that anything more be taken from it than is necessary for the resolution of the dispute between these parties. A bargaining unit comprised of one classification of employee is not one that would normally be found to be appropriate. RNA's do not enjoy status as a craft.* Both these factors are relevant to the current configuration of bargaining units in the health care sector. The multiplicity of classifications contained in a paramedical bargaining unit do not evidence this same historical anomaly faced by the RNA's. Therefore, it is doubtful that any sensible basis would exist for fragmenting that "usual" bargaining unit any further, particularly in light of the Board's comments in *Stratford General Hospital, supra*, (and see *Toronto East General and Orthopaedic Hospital Inc.*, [1981] OLRB Rep. Nov. 1672). While the decision in *Hospital for Sick Children, supra*, places considerable weight on the bargaining unit configuration sought by an applicant it does not ignore concerns of undue fragmentation. In that RNA's do not have status as a craft there would seem to be no basis from which they could "carve out" their classification from existing bargaining unit configurations (Section 6(3) also creates a discretion in the Board where employees are already represented by another trade union to determine whether a "carve-out" would be appropriate in the circumstances of any particular case. See for example, *Shelbourne Residence; Re O.N.A.* [1991] OLRB Rep. Aug. 1005). *To the extent that this decision speaks to bargaining unit configurations in a hospital setting and more particularly those involving RNA's it recognizes that a bargaining unit comprised solely of RNA's may be an appropriate bargaining unit while at the same time recognizing that a bargaining unit described as the "standard" service or all-employee unit including RNA's may well also be appropriate.* The Board has already acknowledged that RNA's may also share a community of interest with either the RN's or the employees in the "paramedical" unit. In this case the applicant seeks to represent RNA's and while recognizing a continuing concern regarding undue fragmentation and its potential effects on both effective collective bargaining and legitimate employer concerns we are not persuaded that in this case they outweigh the equally compelling expression of these employees' section 3 rights.

(emphasis added)

31. In *South Muskoka* the Board referred to these paragraphs and summarized the thrust and effect of the *Mississauga Hospital* decision when it stated at paragraph 16:

... the Board went to considerable length in *Mississauga Hospital* to make it clear in its decision that its conclusion with respect to appropriateness in that case was very much a product of the facts and historical background with which it was confronted, and that any "final" determination about the bargaining units within which a group like the RNA's in the long run might come to be placed, was not something that the Board was purporting to make:

...

Clearly, therefore, what the Board was doing in *Mississauga Hospital* was to indicate a willingness to consider new "options" for the placement of RNA's that went beyond the traditional, and only, option that had been made available to that group in the past. That is the issue of "appropriateness", and the *Mississauga Hospital* case determines that *there can be cases where, based on the facts, and the positions litigated by the parties before the Board, a bargaining unit comprised solely of RNA's might be found to be the "appropriate" one. But just as clearly, in the paragraphs quoted above, the Board did not purport to limit the field henceforward to one single option, or one single trade union.* ...

(emphasis added)

32. In both *Mississauga Hospital* and *South Muskoka* the Board ultimately determined that an RNA only unit in the context of the facts and circumstances at those hospitals did not cause undue fragmentation which would lead to a non-viable bargaining unit or serious labour relations problems for the employers.

33. The Board in both those cases however *also* determined that the historical evolution of bargaining units in the health care sector did not in and of itself automatically place the RNA's in a traditional "service" unit. Given the facts and circumstances at those hospitals, and the evolution

of the skills, training and nature of work performed by the RNA's there was no natural "fit" for the RNA's within the service unit.

34. We disagree with the PNFO's submissions to this panel which suggest simpliciter that either *Mississauga Hospital* or *South Muskoka* stand for the proposition that where, in a hospital setting, this trade union seeks to represent an RNA only bargaining unit such unit will be found to be "appropriate". In our view, a careful reading of those decisions (including their specific references to the PNFO not being a craft union, RNA's not enjoying status as a craft, "claims of professional status [not warranting] the fashioning of separate bargaining units", and bargaining units comprised of a single classification being one that would normally be found to be appropriate, as well as their indication that undue fragmentation continues to concern the Board) does not necessarily support such a conclusion or interpretation.

35. In our view the cases relied upon by the applicant stand for no more and no less than the fact that upon application of the *Hospital for Sick Children's* test the Board *may* find an RNA only unit to be appropriate. Such a unit is not necessarily or always inappropriate as advocated by the respondents in *Mississauga Hospital* or *South Muskoka* merely because, in the past the RNA's had "historically" been included in a service unit. *All* the circumstances, including the historical context of bargaining unit configurations in the health care sector, the rights to self-determination, the viability of the bargaining structure, undue fragmentation and its labour relations consequences etc. must be considered and balanced.

36. Having regard to the test in *Hospital for Sick Children* the Board in *Mississauga Hospital* found the employer hospital's own treatment of the affected employees as a single unit for purposes of employee relations to be a persuasive factor from which it could reasonably be concluded that a single classification bargaining unit of RNA's would *not* create a potential for serious labour relations problems at that institution. For purposes of labour relations the Hospital was already treating the RNA's in a manner that was separate and distinct from "service" employees without any apparent administrative difficulties or adverse labour relations consequences (see for example paragraphs 12 and 20 of the decision). Faced with circumstances in which the Hospital itself had already recognized and treated the group as a separate entity within its own organization the Board properly rejected the Hospital's suggestion that serious labour relations consequences would result in the certification of a unit which the Hospital was already treating as distinct. In addition, the Board properly rejected the suggestion that the RNA unit would be grouped with service employees for reasons relating solely to "history" of collective bargaining within the Hospital sector.

37. To a lesser degree similar circumstances existed in *South Muskoka*. There, except for purposes of the RNA's wages and benefits determinations where the "service" collective agreements were tracked, the employer had for the most part dealt with the RNA's as either part of a broader nursing group (through the Nursing Communications Group) or as a separate and distinct group (as in its pay equity plan or through the voluntary check off of OARNA membership dues). Notwithstanding the fact that there were no apparent circumstances other than "history" which would cause the Board to group together in a single bargaining unit the RNA's and service employees, the employer in *South Muskoka* nonetheless advocated that position in arguing that an RNA only unit was not appropriate. It is not apparent from the decision that the Hospital asserted (and the Board accepted) that serious labour relations consequences would result *at that institution* if the bargaining unit sought was found to be appropriate.

38. In our view neither *Mississauga Hospital* nor *South Muskoka* stand for the proposition that a single classification, RNA only unit will always be found to be appropriate in a hospital set-

ting where this applicant applies for such a unit. Neither case indicates a willingness on the part of the Board to grant what can perhaps best be described as “craft-like” status to the PNFO in the same manner that the passage of time and the historical evolution of collective bargaining within the health care sector has created an anomaly in which one trade union (the ONA) can and does represent one classification (RN’s) in the hospital sector.

39. Having duly balanced all of the considerations including a number of facts which distinguish this case from *Mississauga Hospital*, we have concluded that application of the test enunciated in *Hospital for Sick Children* indicates that the bargaining unit sought by the PNFO in this instance is not appropriate.

40. We begin with the observation that the concept of an “appropriate” bargaining unit includes within it an element of policy. In fashioning bargaining units the Board endeavours to accommodate the potentially competing collective bargaining values to which both parties have referred. The right to self-organization and the desirability of avoiding fragmentation which may increase the potential for industrial disharmony are two such policy concerns (see *Kidd Creek Mines*, [1984] OLRB Rep. Mar. 481). In this regard we note that this application is with respect to employees employed within the hospital industry - an industry in which fragmentation of the work force into several bargaining units is already prevalent and the norm. The Board must be cognizant of that context. More specifically in the facts of this case the context also includes the fact that the employees at this hospital are presently unorganized.

41. In numerous decisions including *Kidd Creek Mines* and the *Hospital for Sick Children* the Board has indicated that fragmentation of a work force into several smaller bargaining units is not generally desirable. In this respect we are prepared to accept as a general proposition those assertions of the employer in this instance which outline the labour relations problems which flow from fragmentation. In this case some of those assertions were challenged by the trade union as having no application because these parties are covered by the *Hospital Labour Disputes Arbitrations Act* (HLDAA). We accept as valid some of those challenges. Thus for example there is no potential for a succession of work stoppages or strikes and their effects on other employees at the institution. In light of the requirement for interest arbitration found in the HLDAA, the spectre of “competition” between bargaining agents and bargaining units is also less significant. The cost associated with negotiating more collective agreements may increase but that factor alone does not in our view outweigh the rights of employees to be represented by the bargaining agent of their choice. We also recognize that there is at least a potential opportunity to address some of the employer’s “fragmentation” concerns at the bargaining table.

42. Nonetheless we accept that generally undue fragmentation of a work force is not desirable. It is for that reason that single classification bargaining units are not normally found to be appropriate. Similarly, concerns about fragmentation and its effects upon job mobility and opportunities to perform specific work functions have significantly limited the expansion of craft unionism outside the construction industry (see for example *Kidd Creek Mines*, *supra*). Although fragmentation need not necessarily result in an increase in craft unionism, an acceptance of craft unionism or “craft-like” bargaining units must inevitably result in fragmentation with its consequent results. This is particularly so in this case where the work force is presently unorganized and a shaping of this initial bargaining unit will undoubtedly influence the shaping of any subsequent bargaining units. The shaping of this unit will also affect any collective bargaining negotiations with respect to RNA’s and other employees at this hospital who may in future seek to bargain collectively.

43. Together with the circumstance that this application arises in a factual context wherein

none of the other employees at this hospital are organized there are a number of circumstances which highlight:

- (a) the inappropriateness of the proposed bargaining unit at this institution;
- (b) the concerns for granting a single classification, craft-like unit (RNA's "employed as" RNA's); and
- (c) the distinction between this case and *Mississauga Hospital*.

44. First there are the present circumstances as they relate to, for example, the operating room (O.R.) technicians. At the time of the making of the application there were persons employed in the position of O.R. technician who were RNA qualified and at least one who was not RNA qualified. The trade union seeks to represent only those employees in the O.R. technician position who are RNA qualified. The PNFO's position is that RNA qualified O.R. technicians are included in the bargaining unit description as they are "employed as" RNA's. The non-RNA qualified O.R. technician on the other hand is not to be included in the bargaining unit. At the time of the making of the application therefore this position places the Hospital in a situation where it is required to deal with employees in the same classification where one employee is represented by the trade union while another is not.

45. The fact that the Hospital now requires RNA qualification or that the non-RNA qualified incumbent obtained the position when RNA qualification was not required by the Hospital (and in any event is expected to retire soon) cannot detract from the difficulty which the PNFO's position underscores when it seeks to have the Board fashion a bargaining unit description in relationship to the qualifications held by employees within the unit (registered or graduate nursing assistants) or the work functions with which such qualifications are typically associated ("employed as" RNA's). For example, if the Hospital "waived" the RNA certification qualification for a particular employee who was otherwise qualified to fill the O.R. technician position (either through experience or education such as perhaps a Licensed Practical Nurse trained outside Ontario), or if the Hospital for whatever reason chose not to require RNA qualification, it is not apparent from the bargaining unit description and the PNFO's position before us whether such employees are to be included in the bargaining unit and represented by the PNFO. This difficulty which perhaps results from an overlap in functions in the O.R. technician and RNA classifications was either not present or not addressed in any detail in the Board's earlier decisions relating to this issue.

46. With respect to this problem there can be little doubt that the PNFO's proposed unit includes and is intended to include those RNA's employed in "nursing" functions. The question then becomes what is included within that nursing function rubric. As with the case of the O.R. technician, from the PNFO's perspective it obviously includes the O.R. technician classification. With respect to other classifications in the Hospital however the position is less clear. Although the PNFO asserts before us that it does not for example seek to represent RNA qualified employees when such employees are employed as ward clerks, it can't be determined with any degree of precision or certainty from the bargaining unit description sought what the parameters of the unit include.

47. To further highlight the difficulty with determining the boundaries of the bargaining unit description at this institution (and the potential for serious labour relations consequences) and by way of another example we refer to those instances where RNA qualified persons perform work in (for lack of a better word) "different" capacities. Again the problems associated with defining what "employed as RNA's" includes are apparent for at this hospital RNA certified, qualified

employees are not employed only as ward clerks. For example RNA's are or have also been "porters" and "activation therapy assistants".

48. In determining the appropriateness of a bargaining unit the Board does not typically look to the employee list. The issue of bargaining unit *description* is generally dealt with first and is distinct from the issue of who falls within that description. Indeed typically the list is not settled until after the bargaining unit description has been settled. In this instance however the parties have already agreed on the list of employees to be considered by the Board for purposes of the count (the parties were advised of that "count" by the Labour Relations Officer.) That agreed upon list discloses examples of the very problems associated with defining a bargaining unit description with reference to qualifications and work functions as it includes not only the O.R. technicians who are RNA's, but it also includes the RNA qualified employee working as a "porter" at the time of the application.

49. There are thus two aspects of the PNFO's position which are particularly troublesome and which show the unit defined in its present terms to be inappropriate at this hospital. The union's *inclusion* of the RNA qualified porter and *exclusion* of the "grandfathered" O.R. technician who is not RNA qualified suggests that the bargaining unit as described may not encompass all employees within a particular classification but only those who are RNA qualified. It also indicates that within this hospital the definition of persons "employed as" RNA's may be somewhat loose and elastic (perhaps because of overlaps in functions of classifications) thereby increasing the potential for collective bargaining conflicts and jurisdictional disputes.

50. As RNA's at this hospital also perform work in these "different" capacities there is also a greater potential that if the Board finds this unit appropriate, employees at the Hospital may be represented by this bargaining agent for only part of their overall employment with the Hospital. This hospital has presented a history which discloses that its RNA's regularly work in such different capacities either in addition to, or instead of, their RNA "nursing" functions. In those instances where the RNA qualified employee works in addition to her part-time employment as an RNA this has the result that the employee would be represented by one trade union while performing certain work functions on behalf of the employer, but that same employee would be unrepresented (or represented by another trade union in the event another bargaining unit is certified at some future date) while performing other work functions for the same employer. The problems associated with such a state of affairs are not probably insurmountable. We find however that where, as here, such circumstances occur with such regularity and consistency a bargaining structure which at its very inception creates such a situation is not appropriate. On the other hand a bargaining structure which seeks to avoid or minimize such potential problems by including within it classifications in which such other job opportunities and work functions are found is appropriate.

51. Once again these issues were not addressed in *Mississauga Hospital* or *South Muskoka*. Thus, in *Mississauga Hospital* it appears that concerns with respect to the restriction of job opportunities beyond the typical nursing function RNA classifications were not present as "the applicant argued that this [was] not an issue in [that] case as there [was] no interchange of RNA's into other classifications, nor employees into the RNA group given the particular nature of the qualification and training." (See paragraph 22 of the decision). Each of these factors distinguish this case from the cases relied upon by the PNFO. These factors highlight some of the practical labour relations consequences which this employer faces if the Board were to find the proposed bargaining unit appropriate. Those labour relations consequences were not present in *Mississauga Hospital* where the employer was already dealing with the RNA's as a separate and distinct group without any apparent difficulty.

52. We have a distinctly different situation before us. This hospital has *not* sought to set the RNA group apart from other employees. In fact the opposite is true. RNA's are presented with job opportunities which appear to go beyond the RNA classification such as ward clerk, store-keeper, activation therapy assistants, porter etc. In addition, a single staff association at the Hospital represents all employees including RNA's, RN's, paramedical and service employees. The existing labour relations structure was *one* of the factors considered by the Board in *Mississauga Hospital* (the apparent lack of an overlap in functions in classifications, the lack of interchange and the consequent absence of possible impediments to other job opportunities, the earlier steelworkers organizing campaign, etc. were some other factors). There is nothing in the existing structure through which employee concerns are raised at this hospital which provides any degree of assurance that labour relations problems will not result if the Board finds as appropriate a bargaining unit comprised of a single classification.

53. On balance we are not persuaded that the unit sought is appropriate. The test propounded in *Hospital for Sick Children* is in our view not satisfied in these circumstances. Although the employees within the proposed bargaining unit share a community of interest and have numerical viability that in and of itself does not meet the *Hospital for Sick Children* test. Having balanced all of the circumstances we conclude that the proposed unit does not constitute a viable bargaining unit which would not at the same time cause serious labour relations problems for the employer.

54. Before leaving this part of our decision we wish to address the PNFO's submissions that if we were to find that an RNA only unit is not appropriate we would in effect be making "a right hand turn" from the two cases relied upon by the PNFO. We note that our determination herein reflects the different factual context with which we are faced. Moreover, in both *Mississauga Hospital* and *South Muskoka* the Board noted that the issues raised by a proposed RNA only bargaining unit were by no means clear cut. Although unfortunate, litigation may be necessary as both the Board and the parties in the health care sector grapple with the issues. The Board in *South Muskoka* made extensive reference to the American jurisprudence and experience in the area of health care sector bargaining units and indicated that the issue was by no means settled. Indeed, the Board in *South Muskoka* concluded its review of both the Ontario jurisprudence and the experience in other jurisdictions with the observation:

... Where all of this will lead in the future remains to be determined by the Board, on the basis of how trade unions and employees in this sector seek to organize, and the compelling nature of the propositions advanced before it.

17. Such a case-by-case approach, while unhappily litigious (initially), would appear, in a situation like the present, to be an appropriate way for the Board to proceed. ...

The Alternative Units Proposed

55. In this case the Hospital has asserted that there is a more natural "fit" or accommodation of the interests of all parties in a broader bargaining unit which includes RNA's and a number of other employees. It has proposed various options as "appropriate". To assist the parties we note only that on the material before us the various options proposed by the Hospital did not appear inappropriate. We have decided however that it is not necessary for us to determine which of the options proposed by the Hospital is to be preferred. There is no application for certification before us for a bargaining unit described in such terms and the PNFO has not adopted as appropriate any of the options urged upon us by the employer. Moreover, having regard to the membership evidence filed the addition of even one non-RNA qualified employee (whether that person is a "service" employee, a "paramedical" employee, or a "nursing" employee) to the PNFO's proposed

bargaining unit will result in the ordering of a vote. If the number exceeds one it could result in the dismissal of this application.

56. It is well established that the Act requires the Board to determine “an” appropriate bargaining unit and not necessarily the “most” appropriate bargaining unit. The test in *Hospital for Sick Children* indicates that if the union seeks to be certified for a bargaining unit which is “appropriate” (viable without at the same time causing serious labour relations problems) the Board will certify the applicant notwithstanding that some other unit may be “more” appropriate. In this case the applicant has not suggested any alternative position. We therefore conclude that since the bargaining unit applied for is not appropriate this application is dismissed.

DECISION OF BOARD MEMBER HUGH PEACOCK; October 30, 1992

1. I dissent.

2. I agree that the Board must have regard to “fact-specific” considerations, and that the test of appropriateness, absent craft status on the part of the applicant, is the viability of the collective bargaining structure it proposes.

3. However, I find that the differences in the fact situation between this proposed unit and that of *Mississauga Hospital* or *South Muskoka* are insufficient to override the Act’s presumption that employees’ wishes for self-determination should outweigh the Board’s policy concerns for fragmentation. It is not necessary for the two to be evenly balanced before conceding the employees’ interests. Indeed, the majority suggests the opposite: That even a degree of inconvenience for the employer is sufficient to tip the scales against the proposed unit.

4. Here the employer, used to dealing with an all-employee staff association (but not required to), would wind up negotiating with two representatives in place of one, in contrast to the 4 or 5 groups listed in paragraph 18 as the typical pattern of fragmented units now found in Ontario’s general hospitals. This hardly qualifies, in my mind, as the “serious labour relations problem” standard the Board has established in *Hospital for Sick Children*, especially where as here, it is acknowledged, the group of employees exhibit “a sufficiently coherent community of interest” and have numerical viability.

5. Moreover, I am concerned at the weight which my colleagues give to the importance of shaping bargaining units in the mirror of the employer’s existing employee relations structure in order to avoid the consequences of fragmentation. True, in *Mississauga Hospital*, the employer was found to be “already treating RNA’s in a manner that was separate and distinct from “service” employees without any apparent administrative difficulties or adverse labour relations consequences ...” (paragraph 36). First, we lack any elaboration from this employer as to the nature of the difficulties it would face in dealing with an RNA only unit as distinct. Second, the majority approves of the Board’s rejection in *Mississauga Hospital* of grouping RNA’s with “service” employees for reasons relating solely to history of collective bargaining within the hospital sector. Later in paragraph 51, however, they go on to rely on the “history” argument, in regard to structure at Strathroy Middlesex Hospital. This difference with the *Mississauga Hospital* case aside, the Board has said over and over in a variety of cases that the introduction of collective bargaining is meant to supersede, not conform to, the pattern of employee relations in a non-union setting. The employer’s existing employee relations structure cannot be determinative of a bargaining unit issue, even in conjunction with other factors such as those dealt with here.

6. Similarly, far too much weight is given (in paragraph 42) to concerns for the impact the shaping of this unit may have on any subsequent bargaining units and collective bargaining negotia-

tions. Confronted with an expression of desire to leave an in-house arrangement now and undertake genuine collective bargaining, the Board should not allow the desires of other employees to remain unorganized to serve as a drag on the RNA's expectations. What if no appetite for collective bargaining develops on the part of the other groups? Does the Board wish to leave the impression it views the certification of a "craft-like" organization as detrimental to the development of an environment in which broader-based collective bargaining can flourish?

7. In paragraphs 46 and following, much is made of the facts that the trade union seeks to represent one RNA employed as an operating room technician, that a person who is RNA qualified appears on Schedule "A" as a porter and other positions such as ward clerk (which the PNFO does not seek to represent) also are worked by RNA's from time to time. Placed before us on agreement, the job description for O.R. technician in Exhibit 1 lists the main responsibilities as follows: "to function as part of the team in caring for the patient" and "to assist with patient care pre and post-operatively". With the possible exception of preparation and sterilization of equipment, the balance of the description points to a high degree of involvement with patient care rather than to a preponderance of technical duties much more remote from patient care. The position is part of the Nursing Department organizationally. The O.R. Tech reports to the Nurse Manager - O.R. according to the job description. With the retirement of the "grandfathered", non RNA qualified O.R. technician, it appears that this position will be filled by only an RNA qualified person. It is my conclusion that there is nothing untoward in the applicant's seeking to include this position in the unit of persons employed as RNA's. It is a fact, certainly, which distinguishes this case from *Mississauga Hospital* and *South Muskoka*. In no way can I agree, nevertheless, that the inclusion of the O.R. technician position in an all RNA unit sets up a presumption that a service unit, or even a nursing unit, is a *more* appropriate unit.

8. The inclusion of an RNA qualified person working as a porter (at the time of the application) in a bargaining unit of RNA's employed as such is much more troublesome. It poses the question for the applicant: Do you really mean to seek a job-specific bargaining unit description or not? For whatever reason, the applicant and the employer have agreed to include on the schedules RNA qualified persons who are employed in non-RNA capacities. While the Board would not normally have regard to a list of names and positions for the purposes of framing a bargaining unit description, I understand how inconsistent the presence of a "porter" in a nursing unit may appear. Nevertheless, I must remind that the essential uses of the lists are to determine composition and the count (not the bargaining unit description), the names are there by agreement of the parties and the parties are free to leave with a certificate and sort out the inconsistency on their own, if they feel the need to. As to the other positions held by RNA qualified persons such as ward clerks, etc. it is accepted that the PNFO does not seek to represent them. The "difficulty" facing the employer of having RNA's move to non-RNA positions and back is not unique to this hospital or to the hospital sector. Teachers and construction foremen come immediately to mind as persons who may regularly or intermittently leave and return to a bargaining unit. Once again, I must ask: Are these employees to be denied the collective bargaining representation they prefer because some may work at times in an unrepresented department?

9. In conclusion, I find that the differences relied upon by my colleagues with the two earlier RNA cases do not have the weight which would cause me to deny the clearly expressed preference of this particular group of employees.

0675-92-U Retail, Wholesale and Department Store Union, AFL:CIO:CLC,
Complainant v. **The Brick Warehouse Corporation**, Respondent

Change in Working Condition - Unfair Labour Practice - Board finding that implementation of revised policy regarding sales commissions on returns and account corrections violating “statutory freeze” - Employer directed to compensate bargaining unit members for all losses

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *W. A. Correll* and *H. Peacock*.

APPEARANCES: *Mary Hart*, *Robert McKay*, *Paul Kessig*, *Mike Weber* and *Frank Rendell* for the complainant; *E. L. Stringer* and *Robert Gloweski* for the respondent.

DECISION OF THE BOARD; October 6, 1992

1. This is a complaint filed under section 91 of the *Labour Relations Act* alleging that the respondent has violated section 81 of the Act.

2. The respondent (also referred to as the “company” or the “employer”) operates a national chain of 40 retail stores offering furniture, electronic and other appliances for sale to the public. Seventeen of its stores are located within the province of Ontario. This complaint was filed in respect of four stores (one each in Burlington and St. Catharines and two in Toronto) where the complainant (also referred to as the “union”) has been certified by the Board to represent bargaining unit employees. The union alleges that the implementation of a revised policy regarding sales commissions on returns and account corrections is in violation of section 81, commonly referred to as the “freeze” provisions of the Act.

3. Subsection (1) of section 81 provides as follows:

81.-(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

4. In its reply the company asserted that the events complained of did not fall within the freeze period in respect of the Toronto store located at 1165 Kennedy Road. At the commence-

ment of the hearing the union acceded to that view and withdrew its complaint in respect of that store.

5. The union was certified to represent employees at the remaining three stores on various dates in December, 1991 and January, 1992. In respect of each of these stores, notice to bargain was given February 7, 1992 and a “no-board” report issued on July 6, 1992. There was no dispute that the events complained of took place during the currency of the freeze period contemplated under section 81(1) of the Act.

6. The remuneration of company employees represented by the union and engaged in the sales departments is provided exclusively on the basis of a commission salary and other sales incentives based on the sale of products. The quantum of commissions varies in accordance with the particular products sold.

7. On or about February 11, 1992 the company implemented changes to the commission levels associated with various products. Those changes resulted in the union filing three unfair labour practice complaints (one for each of the stores involved in the present complaint) alleging violation of the freeze provisions. In response to these complaints, company counsel wrote directly to the union asserting, inter alia, that “[a]s a normal part of the process of running its business the Company has historically changed commission rates on an “as needed” basis depending on a variety of factors including pricing and margins, competition, need to encourage sales of certain merchandise, etc...”. Shortly after this intervention the union’s complaints were withdrawn. The company’s assertion regarding the history of changes to commission rates was not disputed by the union at the hearing into the instant complaint. Indeed, the veracity of the company assertion was well established through certain exhibits entered into evidence. These documents provided numerous examples of changes to commission rates and other sales incentives both prior and subsequent to the commencement of the freeze period.

8. The present complaint, however, does not involve changes to commission rates or related sales incentives. For at least five years prior to the events giving rise to this complaint the company’s policy regarding the impact of returns and other adjustments on employees’ commission was constant. Generally speaking returns made within 60 days of delivery would result in a loss of the commission associated with the sale; returns made after the 60 day period would not affect the commission already received in respect of that sale. Furthermore, even certain returns or adjustments (i.e. those related to damaged settlements, account corrections and certain cases of customer inconvenience) which took place less than 60 days post delivery would not result in the loss of commission already paid on the sale. On or about March 16, 1992 a revised policy regarding sales commissions on returns and account corrections was implemented. The result of this change was that henceforward *all* returns and account corrections, regardless of when they occurred, were to result in the loss of the commission associated with the sale. It is this change which the union asserts is in violation of the freeze provisions.

9. While there was no real dispute between the parties as to either the facts giving rise to the present complaint or the state of the law and the Board’s jurisprudence regarding the statutory freeze, they each urged us to come to opposite conclusions in dealing with this particular case.

10. The parties referred us to a number of cases including *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859; *Corporation of the Town of Petrolia*, [1981] OLRB Rep. Mar. 261; *Simpsons Limited*, [1985] OLRB Rep. Apr. 594; *Arrow Games Inc.*, [1991] OLRB Rep. Feb. 157; and *George St. L. McCall Chronic Care Wing of the Queensway General Hospital*, [1991] OLRB Rep. May 619.

11. The union argues that the company has unlawfully altered a policy which had been in effect for at least five years. The impugned change not only affects employees' levels of compensation, it also forces employees to readjust their expectations and eliminates at least the long standing certainty which previously assured employees that once the sixty day period had elapsed, their commissions were irrevocably theirs. Given the duration and the importance of the previously established policy, the change implemented is not one which was within the reasonable expectations of the employees. This change in policy can, if need be, be distinguished from changes to commission rates per se. Changes to commission rates demonstrate a historical pattern distinguished by the constancy of change and fluctuation in the various rates. But while that pattern of change may bring changes to commission rates within the reasonable expectations of the parties, it is the very unchanging nature of the company's policy on returns and corrections which precludes any such similar conclusion.

12. The company argues that the mere fact that the change in question is the first to be made to the policy in at least five years does not in and of itself lead to the conclusion that a freeze violation has occurred. The freeze provisions not only do not necessarily preclude "first time" events, they also serve to freeze employers' rights which include the right to manage the enterprise. In this respect the company also relies on certain terms of the "standard" employment contracts governing the terms and conditions of its salespeople. The employer also relies on the fact that it is a national enterprise which is managed as such. The present complaint relates to only 3 of the company's 40 stores across the country. The impugned change was part of a national policy change and, so long as there is no evidence of any improper motive, the employer should be permitted to continue its way of doing business.

13. By way of reply, the union acknowledges that "first time changes" are not in and of themselves in violation of the freeze and that managerial rights survive the freeze. The issue is whether the impugned change was within the reasonable expectations of the employees. The fact that the employer acted on a national basis is no defence; the employer may continue to act on a national basis but that is not a license to ignore the freeze provisions. The issue of improper motive is not relevant with respect to the strict liability freeze provisions.

14. Perhaps the most recent and comprehensive articulation of the Board's approach to the freeze provisions can be found in *Simpsons Limited, supra*, which merits quoting at length:

• • •

28. The Board could have interpreted section 79 [now section 81] so as to freeze the precise conditions extant at the time the statutory provisions was triggered. The Board, though, has consistently rejected that approach as an unreasonable interpretation of the legislation. In the Board's view, such an interpretation would effectively paralyze an employer's operations for the duration of the statutory freeze, a period which could be quite lengthy. In effect, the business as before formulation in *Spar Aerospace, supra*, was the Board's response to too expansive a view of employee privileges. To paraphrase *Spar Aerospace*, the employer's right to manage its operation was maintained subject to the condition that the operation conform to the pattern established when the freeze was triggered.

29. Business as before is a slippery concept to apply to specific fact situations. The focus of the test is the pattern of operations, the employer's practice. Certainly, where the practice is accurately embodied in an employer's policy manual, the application of business as before has been relatively straightforward: *J. M. Schneider Inc.*, [1984] OLRB Rep. Apr. 609. There have been other instances where a practice has been so well entrenched as to be beyond dispute: *Spar Aerospace, supra*, with respect to annual merit and annual cost of living increases. On the other hand, the increased parking fee cases illustrate the difficulty in looking for a pattern: see *Oshawa General Hospital*, [1985] OLRB Rep. Jan. 98, and the cases cited therein, including *Humber Memorial Hospital*, [1979] OLRB Rep. Aug. 764 and *Ottawa General Hospital*, Sep-

tember 1984, unreported, File No. 0965-84-U(B). Does business as before require annual adjustments to parking fees, equal increases in fees, regular adjustments, any charge to employees for parking, or, is what is frozen the actual rate in place at the time of the freeze? The cases generally reject the actual rate at the time of the freeze and uphold adjustments to rates. However, the cases reveal the difficulty of looking at a pattern or business as before to measure employees' privileges.

30. The freeze provisions catch two categories of events. There are those changes which can be measured against a pattern (however difficult to define) and the specific history of that employer's operation is relevant to assess the impact of the freeze. There are also first time events and it is with respect to that category that the business as before formulation is not always helpful in measuring the scope of employees' privileges. Some first time events have been readily rejected by the Board, where, for example, the employer has instituted parking fees for the first time during the freeze: see *Scarborough Centenary Hospital*, [1978] OLRB Rep. July 679; *St. Joseph's Hospital*, September 1984, unreported, File No. 0965-84-U(A). On the other hand, the Board has upheld an employer's right to lay-off employees during the freeze (assuming there is no anti-union animus in the decision): *Simpsons*, *supra*; *Burlington Carpet Mills*, [[1980] OLRB Rep. Oct. 1361] *supra*; *The Winchester Press*, [[1982] OLRB Rep. Feb. 284] *supra*; *Grey Owen Sound*, [[1983] OLRB Rep. Apr. 522] *supra*; *Deacon Brothers*, [[1979] OLRB Rep. Oct. 931] *supra*; *Airline (Malton) Credit Union*, [[1981] OLRB Rep. Aug. 1055] *supra*. This right has been confirmed even where the first instance of layoff occurred during the freeze (see *Grey Owen Sound*, *supra*; *The Winchester Press*, *supra*; and where the layoff had occurred elsewhere in the employer's operation but not at the specific location in question (see *Simpsons*, *supra*). The respondent in the instant case cited *Corporation of the Town of Petrolia*, *supra*, for the proposition that the employer may also contract out work for the first time during the freeze.

31. Instead of concentrating on business as before, the Board considers it appropriate to assess the privileges of employees which are frozen under the statute and thereby, delimit the otherwise unrestricted rights of the employer, by focussing [sic] on the reasonable expectations of employees. The reasonable expectations approach, in the Board's opinion, responds to both categories of events caught by the freeze, integrates the Board's jurisprudence and provides the appropriate balance between employer's rights and employees' privileges in the context of the legislative provisions.

32. Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. See, for example, *Corporation of the Town of Petrolia*, *supra*; *Scarborough Centenary Hospital*, *supra*; *Oshawa General Hospital*, [supra], *York-Finch Hospital*, *supra*; *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); *AES Data Limited* [1979] OLRB Rep. May 368. In the latter case, for example, the Board found that the employer was entitled to re-assign job functions since the employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. Thus, in the Board's view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instant case, the Board is expressly articulating the test.

33. The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The reasonable expectations test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur everyday. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would reasonably expect such an occurrence during the freeze. The Board in *Simpsons [Limited]*, [1985] OLRB Rep. Mar. 469], *supra*, although the cleaning was contracted out before the company itself took over that operation, did not conclude there was such a pattern.

34. The reasonable expectations approach also integrates those cases which affirm the right of the employer to implement programmes during the freeze where such programs have been adopted prior to the freeze and communicated (expressly or implicitly) to the employees prior to the onset of the freeze; *Le Patro d'Ottawa*, [1983] OLRB Rep. Feb. 244. The Board consid-

ers that the upholding of the right to contract out during the freeze period in *Corporation of the Town of Petrolia, supra*, does not establish an unrestricted right of the employer to contract out work during the freeze but, rather, recognizes that the employer in that case had embarked on a programme leading to the contracting out well in advance of the freeze and that the employees would reasonably have been aware of his programme in the circumstances (see par. 20, in particular).

35. Finally, the lay-off cases are consonant with the reasonable expectations approach. Very few, if any, work forces are entirely static; fluctuations in the size of the staff complement and its composition are the norm. Employers are generally expected to respond to changing economic conditions through the hiring, termination and attrition of employees. It is in this sense that it is reasonable for employees to expect an employer to respond to a significant downturn in the business with layoffs (or terminations) even where such layoffs are resorted to for the first time during the freeze. The magnitude of the layoffs, of course, must be proportional or relative to the severity of the economic circumstances. Economic justification must be proven where relied on and there must be an absence of anti-union animus. It must also be stressed that, while the expectation of layoffs does not initially depend on the specific history of the employer's operation, there might well be specific evidence with respect to that employer which would negate the otherwise usual reasonable expectation of layoffs in response to an economic downturn.

36. The reasonable expectations approach also distinguishes between layoffs and contracting out. Where there was a pattern of contracting out, of course, there would be no violation of section 79 where work was contracted out during the freeze. However, in the Board's opinion, while an employee would reasonably expect a layoff where there was no demand, i.e., where there was an economic downturn, an employee would not reasonably expect that the work would continue to be performed for the benefit of the employer's operation but through contracting out. This is not to say that the employer does not have the right to contract out work during non-freeze periods, except as limited by a collective agreement. During the freeze, however, and unless there is a practice of contracting out, the employer's right to contract out is limited by the employees' privilege of performing the work if the work is to be performed for the benefit of the employer's operation. Contracting out is merely one of the ways an employer might otherwise increase productivity or efficiency which is caught by the freeze; reducing wages, instituting parking fees, ignoring its policy manual are other means of achieving such goals which are proscribed by the statutory provision.

15. While there may be little controversy regarding the Board's approach to freeze cases it is often not a simple matter to apply the law to particular cases. It is, however, of paramount importance to bear in mind the purpose of the freeze provisions which the Board has recently in *George St. L. McCall Chronic Care Wing of the Queensway General Hospital, supra*, described as follows (at paragraph 12):

...The purpose of these provisions is to provide a fixed and stable point of departure for collective bargaining, and to thereby facilitate the collective bargaining process, by maintaining the terms and conditions of employment for bargaining unit employees in the pattern which existed at the time the freeze provisions came into effect. This ensures a fixed basis for negotiations and precludes any unilateral alteration to the *status quo* which might give one party an unfair advantage in bargaining or for propaganda purposes.

16. Having considered the evidence, the submissions of the parties and the jurisprudence, we are satisfied that the employer's policy change in this case is contrary to the freeze provisions of the Act.

17. In arriving at this conclusion we are essentially persuaded that the change in question to a policy in place for at least five years, a change which has impact on the remuneration of employees and which entirely eliminates any possibility of commissions in the relevant circumstances is not one within the reasonable expectations of the employees. We have considered, as the employer urged us to do, various provisions of the "standard" employment contracts entered into evidence

but have found the relevant provisions too vague and general in nature to support the company's claim that the policy change is one contemplated by those provisions or is otherwise one within the reasonable expectations of the employees. In this respect it is useful to compare the provisions relied on by the employer with those that specifically deal with levels of commission rates. While the former do contemplate the deduction of monies from commissions in certain circumstances, they do not contemplate the same pattern of change associated with commission rates which are explicitly described as "commissions...at such rates as may be established by the Brick from time to time". Consistent with this is the fact that the exhibit titled *Sales Policies and Procedures* explicitly states that "commission rates vary from one to ten percent". Neither do we find those portions of the standard contracts dealing with observance of policies regarding the conduct of sales representatives to be of assistance. Our conclusion in this regard is fortified by the fact that although numerous examples of changes to commission rates were filed in evidence, we were not pointed to a single example (either prior to or during the freeze) where the payment of commissions was entirely eliminated in any particular circumstances.

18. In short, we are persuaded that the change in question is not one which was within the reasonable expectations of the employees. While the employer may have been within its rights to have made the change in question prior to the onset of the freeze (for a somewhat analogous case involving the withdrawal of parking privileges see *Scarborough Centenary Hospital Association*, [1978] OLRB Rep. July 679), we are satisfied and hereby declare that the implementation of the revised policy on sales commissions on returns and account corrections was in violation of section 81(1) of the Act.

19. While we have found that the respondent has violated the Act we also find it appropriate to observe that no improper motive or anti-union animus has been alleged or found in this case.

20. With respect to remedy, in view of the circumstances, including the fact that it would appear that the freeze period had expired even prior to the hearing in this matter, we find it appropriate to limit relief to a direction, which we hereby make, that the respondent fully compensate all bargaining unit members for any and all losses they may have suffered as a result of the respondent's violation of the Act.

21. The Board will remain seized in the event the parties encounter any difficulties in implementing our decision.

3178-91-G United Brotherhood of Carpenters and Joiners of America, Local 785, Applicant v. Toronto Dominion Bank, Respondent

Constitutional Law - Construction Industry - Construction Industry Grievance - Board dismissing employer's submission that construction of banks within sphere of federal labour relations - Board assuming jurisdiction to deal with grievance

BEFORE: *Jules Bloch*, Vice-Chair, and Board Members *F. B. Reaume* and *B. L. Armstrong*.

APPEARANCES: *N. L. Jesin* and *K. Ball* for the applicant; *D. K. Gray*, *G. W. Giorno*, *A. W. Bell*, *D. Moore*, *A. J. Mollica*, *H. Buchmueller* and *E. de Haan* for the respondent.

DECISION OF THE BOARD; October 30, 1992

1. This is a referral of a grievance pursuant to section 126 of the *Ontario Labour Relations Act*. ("the Act"). The applicant Local Union 785 of the United Brotherhood of Carpenters and Joiners of America ("carpenters") alleges that the respondent, Toronto-Dominion Bank ("T.D."), failed to abide by certain conditions of the I.C.I. provincial collective agreement. Prior to commencing the hearing, T.D. advised the Board that it was raising a preliminary argument, that the Board was without jurisdiction to entertain the grievance, because the construction of banks was within the sphere of federal labour relations. Counsel for T.D. argued that all certificates issued by the Board to the carpenters, in respect of employment with T.D. were of no force in law. The issue of estoppel was not raised before the panel and consequently the panel has not made any rulings with respect to that issue.

2. Elzo Dehaan and Allen Bell testified on behalf of T.D. The parties were afforded full opportunity to call witnesses and present evidence in this matter. The evidence is essentially not in dispute, however its characterization is very different depending on the parties' differing points of view.

3. T.D. is engaged in the business of "banking" under authority of the *Bank Act*, R.S.C. 1985. c. B-1, as amended ("Bank Act"). This legislation was enacted by the Parliament of Canada pursuant to its exclusive constitutional authority under section 91 (15) of the *British North America Act*. The *Bank Act*, empowers all the chartered banks in Canada to "acquire, hold, maintain, improve, develop, repair, service, lease, dispose of or otherwise deal with real property" Mr. Dehaan, T.D.'s manager of real estate in the Ontario south west division, testified that the Bank owned 66% of its branches free-hold. The decision to build a branch is a company wide decision which involves many of the bank's divisions. T. D. only builds for itself, and does not use its resources for general contracting assignments. On all T.D. projects, the person in charge is T.D.'s in-house chief architect. Essentially, all decisions about construction, including blue print approval, are done in-house. T.D. stipulated that during all phases of planning and construction, the Bank was under the provincial legislative authority in respect of the *Planning Act*, the *Building Code* and municipal taxes.

4. The parties made extensive submissions before the panel. These submissions were carefully reviewed. The panel reserved its decision. The parties filed case books with the panel. The citations of the cases referred to by both counsel in argument are reproduced below:

Municipality of Metropolitan Toronto, [1980] O.L.R.B. Rep. Jan. 62

Kinsmen Club of Leamington, [1983] O.L.R.B. Rep. Nov. 1850

Arrow Transfer Company Ltd. (1974), 74 C.L.L.C. 16,130

A.T.M. Automatic Teller Machine Services (1985), 66 B.C.L.R. 378

Bachmeier Diamond and Percussion Drilling Co. Ltd. (1962), 35 D.L.R. (2d) 241 (Sask. C.A.)

Bernshine Mobile Maintenance (1985), 62 N.R. 209 (Fed. C.A.)

Canada Post Corporation, unreported decision of Fed. C.A. January 28, 1988, file no. A-762-87

Canadian Pacific Railway Co., [1950] A.C. 122 (P.C.)

Cargill Grain Company Limited (1983), 51 N.R. 183 (Fed. C.A.)

- General Enterprises Ltd.* (1977), 77 C.L.L.C. 16,084 (C.L.R.B.)
- Highway Truck Service Ltd.* (1985), 62 N.R. 218 (Fed. C.A.)
- Johnston Terminals Limited*, [1982] 2 Can. L.B.R. 446 (C.L.R.B.)
- Loomis Messenger Service*, [1985] O.L.R.B. Rep. July 1131
- Marathon Realty Company Limited*, [1978] 1 Can. L.R.B.R. 493 (C.L.R.B.)
- Midvalley Construction Limited* (1974), 74 C.L.L.C. 16,100 (Alta. Bd.I.R.)
- Midvalley Construction Limited* (144), 74 C.L.L.C. 14,243 (Alta S.C.)
- Montcalm Construction Inc.* (1978), 79 C.L.L.C. 14,190 (S.C.C.)
- Northern Electric Co.* (1963), 63 C.L.L.C. 15,484 (Ont. H.C.J.)
- Northern Telecom Ltd.* (No.1) (1979), 79 C.L.L.C. 14,211 (S.C.C.)
- Northern Telecom Ltd.* (No.2) (1983), 83 C.L.L.C. 14,048 (S.C.C.)
- Paul L'Anglais Inc.* (1983), 83 C.L.L.C. 14,033 (S.C.C.)
- Peter Kiewit Sons Co. Ltd.*, [1988] O.L.R.B. Rep. May 510
- Daniel Piotrowski* (1986), 67 d.i. 19 (C.L.R.B.)
- Reimer Express Lines Limited* (1987), 69 d.i. 161 (C.L.R.B.)
- Societe Canadienne des Metaux Reynolds Ltec.* (1983), 9 D.L.R. (4th) 364 (Que. C.A.)
- Verrault Navigation Inc.* [1985] C.A. 156 (Que. C.A.)
- Vibration Assessment Limited*, [1989] O.L.R.B. Rep. Feb. 223
- Waschuk Pipeline Construction Ltd.* (1988), 62 Alta. L.R. (2d) 318 (Alta. Q.B.)
- I.U.O.E. Local 796 v. Royal Bank of Canada*, [1968] O.L.R.B. Rep. (May) 169 (Brown, Archer, Irwin).
- Canadian Pioneer Management Ltd. et al. v. Saskatchewan (Labour Relations Board) et al* (1980), 107 D.L.R. (3d) 1 (S.C.C.)
- Bell Canada v. Quebec (Commission de la sante et de la securite du travail) et al.* (1988), 51 D.L.R. (4th) 161 (S.C.C.)
- Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board) et al.* (1988), 51 D.L.R. (4th) 253 (S.C.C.)
- Canadian National Railway Co. v. Courtois et al.* (1988), 51 D.L.R. (4th) 271 (S.C.C.)
- Commission du Salaire Minimum v. Bell Telephone Co. of Canada* (1966), 59 D.L.R. (2d) 145 (S.C.C.)
- Canada (Attorney General) v. St. Hubert Base Teachers' Association* (1983), 1 D.L.R. (4th) 105 (S.C.C.)
- Green's Ambulance v. London and District Service Workers' Union*, [1978] O.L.R.B. Rep. (Oct.) 919 (Burkett, Hodges, Wightman)

5. Constitutional law by its very nature is a hair splitting exercise. This sentiment has recently been captured by a decision of this Board. In *Canadian Communications Structures Inc.*, [1992] OLRB Rep. July 777 the Board stated at paragraph 38:

We are cognizant of the respectability of opposing views on matters of constitutional jurisdiction. Judges, labour boards and commentators at all levels regularly come to well reasoned, opposite, conclusions on the same facts. Mr. Justice Laskin did not agree with the majority in *Construction Montcalm* where the construction of a federal airport was found to be within provincial jurisdiction. Mr. Justice Beetz, who wrote the majority decision in *Construction Montcalm*, did not agree with the majority decisions in *Northern Telecom II*, and would have found the installers' work to have been provincial. Mr. Justice Dickson, part of the *Northern Telecom II* majority, found the facts to be close to the line between federal and provincial jurisdiction, but apparently not close enough to have the general rule of provincial competence tip the balance, as Mr. Justice Beetz would have had it in his dissent. [To the extent that the facts before us can be described as similarly close to the sometimes permeable constitutional divide, we find the decision of the Supreme Court of Canada in *Northern Telecom II* to be most persuasive.]

6. In *Montcalm*, the Supreme Court of Canada had to determine the labour relations jurisdiction of a private contractor performing a construction contract for an airport. Beetz J., writing for the majority, reviewed the constitutional framework in these types of cases, at page 25:

The issue must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: *Toronto Electric Commissioners v. Snider*, (1925) A.C. 396. By way of exception however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: In the matter of a reference as to the validity of the Industrial Relations and Disputes Investigation Act [55 CLLC 26 15,223], 1955 S.C.R. 529 (the *Stevedoring* case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

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7. Of further assistance is the approach taken by the British Columbia Labour Board in *Arrow Transfer*. In that case the British Columbia Board had to decide whether persons responsible for vehicle maintenance in a federally related trucking company fell within federal or provincial jurisdiction. The Board, at page 109, stated:

In these and other cases of this genre the Courts have adopted this approach. They begin with the operation which is at the core of the federal undertaking (e.g. railway, shipping, or the postal service). They then look at the particular subsidiary operation engaged in by the employees whose collective bargaining is in question and reach a judgment about the relationship of that operation to the basic federal undertaking. The judges have used a variety of terms to characterize the part the particular operation may play in the over-all enterprise. It must have a "vital", "essential", "integral", "important", or "intimate" role in the undertaking if it is to fall within the jurisdiction of Parliament. As was said earlier, that has been the conclusion about the relationship of stevedoring to shipping and of mail pick-up to the postal service; the opposite conclusion was reached regarding the relationship of a hotel to the railroad. In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.*

8. The case law points to a dichotomy between an institutional test and a functional test.

An institutional test would not review the components which make up a Bank. The court or tribunal would simply determine if the enterprise was a bank and then all aspects of the enterprise would be viewed as banking. The functional test asks one to view all the different functions of the enterprise, so that a decision can be made about which functions relate directly or integrally to core banking functions.

9. Counsel for T.D. argued that this was an appropriate case to use an institutional test to determine the labour relations jurisdiction. Counsel made reference to two cases. *Canadian Pioneer Management Ltd.* and *Royal Bank of Canada* review the circumstances under which one would apply an institutional test. In *Canadian Pioneer Management Ltd.*, the majority of the Supreme Court of Canada, held that the functional test was inappropriate to the issue. In that case the court was trying to distinguish between banks and near banks. It was the view of the Court that in those situations it was difficult if not impossible to draw distinctions by using the functional test. This is not so in the case at bar. In *Royal Bank of Canada*, this Board found that it did not have jurisdiction to certify a unit of stationary engineers employed by the bank at its Ottawa office. The Board found those employees to be integral to the operation and running of a bank and consequently within the ambit of the federal jurisdiction.

10. The case at bar involves the construction of banks within the Province of Ontario by T.D.'s own employees. The question the panel must answer is very narrow. Is construction of a bank branch by T.D. an integral part of the banking function? This case is different and distinguishable from the *Royal Bank of Canada* case, in that the Bank's construction employees are not integral to the running of the Bank. During the construction phase, there is no banking going on at the site. Although this is a case that is close to the constitutional dividing line, the Board finds construction of a bank building to be a pre-operational task and consequently not integral to the banking function as prescribed by the *Constitution Act, 1867*. The banking function does not include the building of premises to be used by a bank. It is clear that the framers of the *Constitution Act, 1867* were concerned about centralizing banking practices and structures. We do not believe that these concerns relate to the conformity of banking premises. The fact that provincial labour relations laws impact on the building of bank premises does not in any way affect the economic or other banking regulation of the banking sector. There is no doubt that the *Bank Act*, R.S.C. 1985, c. B-1, as amended, confers on banks the power to build banks; however, this legislation does not confer federal constitutional authority with respect to labour relations of those engaged in the construction of what, after all, is simply a building.

11. For all of the foregoing reasons, the Board finds that it has jurisdiction to deal with this grievance. The Registrar is directed to re-list this matter for hearing.

0479-92-U Wellington Separate Support Staff Association, Applicant v. The Wellington County Separate School Board, Respondent.

Bargaining Unit - Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Voluntary Recognition - Employer seeking recognition clause different from one found in voluntary recognition agreement - Board finding that parties had bargained to impasse and that employer's insistence on pressing its position on bargaining unit constituting bargaining in bad faith - Board making cease and desist direction, but declining to order payment of damages

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

APPEARANCES: *James G. Knight, Marion Cozzarin, Bruna Ballestrin* and *Toni DiBattista* for the applicant; *Joseph N. Tascona, R. Michael McKinnon* and *T. S. Waters* for the respondent.

DECISION OF THE BOARD; October 7, 1992

1. This is a complaint pursuant to section 91 of the *Labour Relations Act* (the "Act") in which the complainant the Wellington Separate Support Staff Association (the "Association") alleges that the respondent, The Wellington County Separate School Board (the "School Board" or the "Employer") has violated section 15 of the Act. Section 15 states:

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

2. At the outset of the hearing the parties provided the Board with opening submissions. After hearing those submissions it was apparent that the facts were essentially not in dispute. After a brief recess, both parties indicated that they had elected not to call any evidence and were prepared to proceed based upon the factual context outlined in their opening submissions. We therefore proceeded directly to final submissions.

3. The Association has existed for many years and has represented its members in informal negotiations with the School Board concerning terms and conditions of employment. In March 1991 a memorandum of settlement covering the period January 1, 1991 to December 31, 1991 was signed between the parties. Amongst other things, this memorandum dealt with wages and terms and conditions of employment.

4. On May 8, 1991 the parties signed a voluntary recognition agreement which provided as follows:

VOLUNTARY RECOGNITION

BETWEEN:

WELLINGTON COUNTY ROMAN CATHOLIC SEPARATE SCHOOL BOARD

(the "School Board")

-and-

WELLINGTON SEPARATE SUPPORT STAFF ASSOCIATION

(the "Association")

IN THE MATTER OF the voluntary recognition by the School Board of the Association as the sole and exclusive bargaining agent for a group of employees of the School Board hereinafter defined as the "bargaining unit";

WHEREAS the School Board is satisfied that the Association is a trade union as defined by the *Labour Relations Act*;

AND WHEREAS the School Board is satisfied that the Association is entitled to act as bargaining agent for the bargaining unit, that the majority of employees in the bargaining unit have freely chosen the Association as their bargaining agent, and that the Association would have sufficient membership support to be certified as bargaining agent by the Ontario Labour Relations Board;

NOW THEREFORE the parties agree as follows:

1. The School Board recognizes the Association as the sole and exclusive bargaining agent for all office, clerical and technical employees of the School Board, save and except supervisor, those above the rank of supervisor, CUPE and teachers. The group of employees of the School Board hereby represented by the Association as bargaining agent are accordingly defined for present purposes as the bargaining unit.
2.
 - a) For greater certainty, the parties agree that the bargaining unit is currently comprised of the individuals listed alongside their current positions in Schedule A to this voluntary recognition and further recognize and adhere to the types of memberships and any limitations thereto;
 - i) member - includes only employees of the Wellington County Roman Catholic Separate School Board who are office, clerical and technical employees, save and except supervisors, those above the rank of supervisor, CUPE and teachers.
 - ii) restricted member - includes only employees of the Wellington County Roman Catholic Separate School Board who are project officers, equivalent officers and/or office, clerical and technical employees assigned to the Director of Education's office. The duties of a "restricted member" shall exclude involvement in Association negotiations and such related Association activities.
 - b) This recognition of member and restricted member referred to in 2, a), i and ii, immediately above, is without prejudice to the position of either party in any subsequent hearing in connection with proceedings between the parties.
3. The parties hereby affirm that the School Board did not participate in or interfere with the formation, selection or administration of the Association, nor did the School Board contribute financial or other support to the Association.

4. The Association hereby notifies the School Board of its desire to bargain with a view to making a collective agreement. The parties hereafter agree to be bound by the bargaining process set out in the *Labour Relations Act*.

DATED at GUELPH, this 8TH day of MAY, 1991.

FOR THE ASSOCIATION

"Marion Cozzarin"

"B. Ballestrin"

FOR THE SCHOOL BOARD

"Illegible"

"Illegible"

(Schedule A omitted)

5. On November 21, 1991 the Association applied for conciliation. The parties agreed to defer conciliation and held their first negotiating session on January 23, 1992. On this date the Association provided the School Board with its proposed collective agreement which included the following scope and recognition clause:

ARTICLE 2 - RECOGNITION AND NEGOTIATIONS

- 2.01 The School Board recognizes the Association as the sole and exclusive bargaining agent for all office, clerical and technical employees of the School Board, save and except Supervisors, those above the rank of Supervisor, C.U.P.E. and O.E.C.T.A. The group of employees of the School Board hereby represented by the Association as a bargaining agent are accordingly defined for present purposes as the bargaining unit.

The Association changed the reference to "teachers" found in the bargaining unit as defined in the voluntary recognition agreement to "OECTA" in the above article. This is not a substantive change to the voluntary recognition agreement, as both versions reflect the "teachers" employed by the School Board.

6. The parties met again on February 6, 1992 and the School Board tabled its proposed collective agreement. It included the following recognition clause:

ARTICLE 2

RECOGNITION

- 2.1 The Board recognizes the Association as the sole and exclusive bargaining agent for all employees employed in clerical, secretarial and office services save and except Supervisors and Officers, those persons above the rank of Supervisors and Officers, Human Resource Department staff, temporary employees, Computer Services Department staff, payroll Department staff, secretaries to the Director and Superintendent, REcording Secretary, Co-ordinator of Purchasing and Budgets, Accountant, Professional Support Staff, persons regularly employed for not more than twenty-one (21) hours per week and students employed during the school vacation periods.

There are significant differences between this proposed bargaining unit and the bargaining unit agreed to in the voluntary recognition agreement. The Association immediately objected to the School Board's proposed recognition clause and insisted that the bargaining unit remain as defined in the voluntary recognition agreement. The School Board refused to withdraw its proposed recognition clause. The Association therefore requested that the next meeting be conducted with the assistance of a conciliator and two negotiating sessions which had already been scheduled, were cancelled.

7. The parties met with a conciliator on March 11, 1992. On April 2, 1992 the Association

provided the School Board with a revised proposal and on April 29, 1992 the School Board responded with its revised proposal for a collective agreement. Neither the Association nor the School Board changed their respective positions with regard to the recognition clause. A "No Board Report" was requested by the Association and it was issued by the Minister of Labour on April 23, 1992. The effect of a "No Board Report" is to place the parties in a legal strike or lock-out position fourteen days after the release of the report. Fortunately in this case the parties have continued to negotiate and neither side has resorted to economic sanctions.

8. On March 17, 1992 the School Board applied to the Board pursuant to section 108(2) of the Act seeking a declaration that various individuals were not employees within the meaning of the Act.

9. On September 3, 1992 the School Board sent the Association an amended proposal concerning the scope and recognition clause. It reads as follows:

- 2.1 The Board recognizes the Association as the sole and exclusive bargaining agent for all employees employed in clerical, secretarial and office services, save and except Supervisors and Officers, those persons above the rank of Supervisor and Officer, Human Resource Department staff, Secretary to the Director of Education, Secretary to the Superintendent of Business, Co-ordinator of Information Services, Recording Secretary to the Board, Professional Support Staff and all employees covered by the C.U.P.E. and Teacher Collective Agreements.

Therefore, the School Board as of September 3, 1992 modified its demands concerning the scope and recognition clause but it was still not prepared to agree to the bargaining unit set out in paragraph one of the voluntary recognition agreement.

10. The Association alleges that the School Board is bargaining in bad faith as it has reneged on the voluntary recognition agreement and is illegally seeking to alter the scope and recognition clause. The School Board disputes this.

11. Counsel for the Association asserted that the voluntary recognition agreement sets out the agreed upon bargaining unit in paragraph one. Paragraph two provides for two types of bargaining unit members, "restricted" members and "members". In his submission, although there are two "classes" of membership, the parties agreed that both types of members are members of the bargaining unit. Counsel for the Association explained that the Association wanted to be open to all staff but was concerned that certain employees might find themselves in a position of conflict during collective bargaining. Hence, the exclusion from the negotiations and related activities found in paragraph 2(a)(ii) was to apply to seven positions and their incumbents. However, although they were therefore "restricted" in the sense that they could not become involved in negotiations or related activities, they were still members of the bargaining unit as defined in paragraph one of the voluntary recognition agreement. Counsel on behalf of the Association acknowledged that the parties intended paragraph 2(b) to provide either party with the right to challenge, via proceedings before the Board or at arbitration, whether or not an individual was a supervisor and should be excluded from the bargaining unit. In counsel's submission paragraph 2(b) acts to preclude either party from asserting the matter has been settled. Counsel for the Association takes the position that although the language in paragraph 2(b) was unique and maybe even peculiar, paragraph one consisted of a straight forward bargaining unit description that the School Board was now seeking to change in the negotiations process.

12. Counsel on behalf of the School Board took the position that the bargaining unit, as set out in the voluntary recognition agreement, has not been totally defined. He agreed that Article 2 provides for restricted members but he asserted that these restricted members were individuals

who in a normal certification would fall outside the bargaining unit. Because of this, the parties included paragraph 2(b) to reserve for either side the right to contest the membership in the bargaining unit. Counsel argued that the School Board does not construe paragraph 2(b) as narrowly as the Association. He asserted that paragraph 2(b) resulted in the bargaining unit being qualified and left either party the right to deal with the definitions of members and restricted members set out in paragraph 2(a).

13. Based on his interpretation of the voluntary recognition agreement, counsel for the Association argued that after failing to obtain the agreement of the Association to a new scope and recognition clause containing a significantly different bargaining unit than that agreed to in the voluntary recognition agreement, in pressing this issue to the point of impasse the School Board has violated section 15 of the Act. Counsel pointed out that a voluntary recognition agreement is the same as a Board's certificate and that it sets out the bargaining unit description which is the corner stone for the collective bargaining which takes place. At negotiations, it is not illegal to raise and seek to discuss the issue but it is illegal to take it to impasse. In support of this proposition counsel referred the Board to the *Brantford Expositor*, [1988] OLRB Rep. July 653 and the cases referred to therein.

14. Counsel for the School Board took the position that the negotiations concerning the scope and recognition clause have not reached an impasse. He pointed to the comments in the *Wellington Dufferin Guelph Health Unit* case cited in the *Brantford Expositor* case, that "No strike or lock-out was imminent nor are we satisfied that this issue was a real stumbling block to an agreement or that but for the employer's insistence on this issue there would have been an agreement" and argued that the same is true in the case before us. He stressed that the parties have continued to negotiate and that no strike or lock-out ever was or is imminent. He pointed to the fact that the School Board had not asked for a no Board report as additional justification for a finding that the parties have not negotiated to the point of impasse on the issue of the scope and recognition clause. Counsel for the School Board also asserted that there was nothing illegal in what the School Board was seeking in that its demands with regard to a scope and recognition clause were not inconsistent with the exclusions the Act provides for under section 1(3)(b).

15. Counsel for the Association in reply argued that the impasse in this case is on a narrow issue. It concerns the scope and recognition clause. The fact that both sides have continued to negotiate on other issues does not effect this. In counsel's submission, the bargaining unit issue is not resolved as the Association has maintained from the first bargaining session that it is not prepared to amend the bargaining unit description contained in the voluntary recognition agreement. The School Board is maintaining even as late as one week before the hearing, a position significantly different from the voluntary recognition agreement. Counsel asserted that it is clear from this that the parties are at impasse on this issue.

16. The Association is seeking:

- (i) a declaration that the respondent has violated the Act, an order, to be posted, that the respondent proceed forthwith to comply with section 15 of the Act, and that the respondent agreed to the services of a mediation officer;
- (ii) an order, to be posted, that the respondent withdraws proposed Article 2 and that it confirm the scope and recognition clause agreed to in the voluntary recognition agreement; and
- (iii) an order, to be posted, that the respondent reimburse the complain-

ant for all reasonable legal cost which were consequence of its unlawful activity.

In support of its request for costs due to the position the School Board took with regard to the scope and recognition clause, counsel for the Association referred the Board to: *Plaza Fiberglas Manufacturing Limited*, [1990] OLRB Rep. Feb. 192; *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. September 1303; *Canton - East Ferris - Township*, [1988] OLRB Rep. Sept. 866; *Morewood Industries Limited*, [1987] OLRB Rep. Jan. 92; *Burlington Northern Air Freight (Canada) Ltd.*, [1986] OLRB Rep. Dec. 1628; *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453; *Consolidated Bathurst Packaging Ltd.*, [1984] OLRB Rep. March 422 and *Canada Cement Lafarge Ltd.*, [1981] OLRB Rep. Dec. 1722.

Decision

17. We do not accept the interpretation of the voluntary recognition agreement put forward by counsel for the respondent. Paragraph one of that agreement sets out the agreed upon bargaining unit description. Paragraph 2(a) provides for two types of bargaining unit members, "restricted" members as defined by paragraph 2(a)(ii) and all other members as defined by paragraph 2(a)(i). Paragraph 2(b) leaves it open to the parties to contest who should be a restricted member and who should not be. If someone's status as a result of a challenge should change from member to "restricted" member, there is nothing in paragraph 2 that suggests they are not still to be included in the bargaining unit. We agree with counsel for the Association that paragraph 2 sets up two types of members in the bargaining unit but that both types are in fact still included in the bargaining unit. The bargaining unit as set out in paragraph one is extremely clear. We conclude therefore that the parties have executed a voluntary recognition agreement and that the bargaining unit description agreed to and contained in paragraph one is binding on both parties. The bargaining unit has been totally defined and it is not qualified by paragraph two.

18. Counsel on behalf of the School Board took the position that there was nothing illegal in the School Board seeking a recognition clause different from the one found in the voluntary recognition agreement, as its demands were not inconsistent with bargaining unit exclusions the Board often finds pursuant to section 1(3)(b) of the Act. Whether or not the agreed upon bargaining unit in the voluntary recognition agreement covers individuals who the Board *might* exclude is not the issue before us. What is at issue is the fact that the School Board, having agreed to a particular bargaining unit in a voluntary recognition agreement, now seeks to resile from that agreement. The School Board in this case has made an application pursuant to section 108(2) concerning some of the employees who are currently included in the bargaining unit as set out in the voluntary recognition agreement. Utilizing section 108(2) may be an appropriate way to address the School Board's concerns with regard to the status of certain individuals. However, it is not appropriate for the School Board to attempt to negotiate to impasse a recognition clause which is different from the agreed upon bargaining unit description in the voluntary recognition agreement.

19. The School Board on February 6, 1992 tabled as part of its proposed collective agreement a scope and recognition clause significantly different from the bargaining unit description found in the voluntary recognition agreement. The Association opposed any change to the previously agreed upon bargaining unit. While it is not illegal to raise and seek to discuss this issue, we agree with counsel for the Association that it is a violation of section 15 to take this issue to impasse. This is not to say that the scope of a bargaining unit once agreed to can never be altered. By an order of the Board or by the agreement of the parties a bargaining unit can either expand or contract in size. However, one party cannot by the use of economic sanctions seek to force the

other party to agree to an amended bargaining unit description. The jurisprudence on this issue was summarized in the *Brantford Expositor* case, *supra*, as follows:

...

15. The Board's jurisprudence makes it clear that neither party to a collective agreement may press to impasse the definition of the bargaining unit, the extension of bargaining rights or other matters of recognition, because the concept of the definition of the bargaining unit and the recognition of its representative is fundamental to the scheme of the Act. This general theme has been sounded in variety of fact situations, e.g. a trade union attempt to force the extension of its bargaining rights, *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. Aug. 776, an employer's attempt to solve an anticipated jurisdictional dispute by way of bargaining, *Toronto Star*, [1979] OLRB Rep. Aug. 811 (the Burkett panel), a union's efforts to extend its rights beyond the provincial limits determined by the constitution, *Burns Meats*, [1984] OLRB Rep. Aug. 1049, and an attempt by an employer to modify the recognition clause to avoid a related employer declaration, *Cybermedix Limited*, [1981] OLRB Rep. Jan. 13. However, it is clear that the parties are entitled to raise and discuss these matters, as took place in the *Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309 and in the earlier *Toronto Star* case, *Toronto Star Newspaper Limited*, [1979] OLRB Rep. May 451 (the Carter panel). The Board's approach in the context of an employer proposal to delete casual nurses from the bargaining unit in the *Wellington Dufferin Guelph Health Unit* case, [1979] OLRB Rep. Nov. 1115 was as follows:

The bargaining unit issue poses more difficulty involving, as it does, the allegation that the respondent has sought to force the union to give up its statutory right to represent certain employees in the unit. This issue was discussed in *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. Aug. 776 where the Board found that a trade union could not strike to force the inclusion of employees in a bargaining unit. Although the Union and Employer could voluntarily agree to their inclusion, the board found that this issue could "not be pressed to an impasse", i.e., made the subject of a strike. Similar reasoning (and language) was employed by the board in *Toronto Star*, [1979] OLRB Aug. 811, where the Board characterized the employer's conduct as an attempt to circumvent the jurisdictional dispute provisions of the Act. It is contended that the present case is the reverse of the situation in the *Carpenters* case, *supra*, but we need not comment on that case because we are not persuaded that the bargaining unit issue was "pressed to an impasse." No strike or lock-out was imminent nor are we satisfied that this issue was the real stumbling block to an agreement or that "but for" the employer's insistence on this issue there would have been an agreement. The union was entitled to refuse to discuss the matter and require the employer to move on, but we are not convinced that the union did take this unequivocal position. One might wonder why, after so many years, the employer raised the matter, and left it "on the table" in face of the obvious opposition on the union; however, as at the date of the hearing, it was no longer "on the table" and we need not consider it further. Had we been satisfied that the employer was adamantly insisting on restructuring the unit or was directly, or indirectly, making either an agreement or a major concession conditional on the union's acceptance of its position in this matter, we would have found a breach of section 14.

16. It has been emphasized in the various cases that the bargaining unit is the critical starting point of collective bargaining and the manner by which one defines the parties to the bargaining relationship. A clearly defined bargaining unit is also necessary to know the grouping of the employer's employees in respect of which there is a duty under section 15 to bargain in good faith and make every reasonable effort to make a collective agreement. The general rule is that the parties are not allowed to insist upon demands which give rise to an illegality or to press to impasse a demand inconsistent with the scheme of the Act, which includes demands to restructure the bargaining unit.

...

20. On the facts before us, the Association has acquired bargaining rights for the employees

of the School Board in the bargaining unit as defined in paragraph one of the voluntary recognition agreement. For the purposes of determining this application, it makes no difference whether the Association acquires those rights via the Board's certification procedures or through the auspices of a voluntary recognition agreement. In the case of certification the Board makes a finding concerning the bargaining unit appropriate for collective bargaining and in the case of a voluntary recognition, the parties reach an agreement without recourse to the Board. The Act contemplates both possibilities and in both circumstances the employer is bound to meet with the holder of the newly acquired bargaining rights and negotiate a collective agreement.

21. Counsel for the School Board argues that the Association is premature in filing this complaint as the parties are not at an impasse. From the beginning, the Association has not agreed to discuss any changes to the bargaining unit set out in the voluntary recognition agreement. The School Board has not accepted this refusal and has continued to insist on alterations to it. The Association was in a legal strike position in May, 1992 as they had obtained a no board report in April. They could have walked away from the bargaining table and perhaps precipitated a strike or lock-out but they chose not to. We disagree with counsel for the School Board's characterization that before the parties can be found to be at an impasse a strike or lock-out must be eminent. In the case before us the parties are in a legal strike or lock-out position and either side could resort to that economic sanction at any time. Given the intransigence of the parties on the issue of scope and recognition, further bargaining on this issue would have been meaningless and the parties could not conclude a collective agreement without resolving this issue. To find the Association's application premature and send the parties back to the bargaining table would be simply delaying the inevitable. There is no reason to anticipate that the parties will reach agreement on a new scope and recognition clause as there is no indication that the position of the parties will change. Whether or not the parties in a particular situation are at impasse on an issue is a judgement call. The fact that the parties are in a legal strike or lock-out position, in conjunction with the fact that the parties have not moved from the positions which were taken by them in January and February of this year concerning the negotiability of the scope and recognition clause, leads us to conclude that the parties have in fact bargained to impasse on the matter of the scope and recognition clause.

22. The Association took the position that the School Board's insistence on amending the scope and recognition clause has delayed the negotiations between the parties and put it to considerable expense. The Association has requested that the Board order the School Board to pay as damages all the additional expenses incurred by the Association in bargaining. In the circumstances of this case, we are not prepared to make such an order. As counsel for the Association candidly admitted, paragraph two of the voluntary recognition agreement is somewhat unique. The School Board's interpretation of this paragraph resulted in it taking the position it did concerning the scope and recognition clause. Although we have concluded that this interpretation was incorrect, the position taken by the School Board was not completely unreasonable. In addition, we would observe that given that the parties have continued to negotiate it is not apparent that the negotiations have been unduly delayed.

23. Having regard to the foregoing, the Board:

- (a) declares that the School Board has violated the section 15 duty to bargain in good faith by bargaining to impasse on a scope and recognition clause different from that found in the voluntary recognition agreement; and
- (b) directs the School Board to cease and desist from its position con-

cerning the scope and recognition clause, to withdraw its current proposal concerning the scope and recognition clause and that it confirm the bargaining unit description set out in the voluntary recognition agreement.

COURT PROCEEDINGS

1761-88-OH; 1563-89-U (Court File No. 17959/91) Jill Bettes, Applicant v. Boeing Canada/DeHavilland Division and Susan A. Tacon, John A. Ronson and David A. Patterson and Ontario Labour Relations Board, Respondents

Health and Safety - Judicial Review - Employee citing second-hand tobacco smoke in work refusal - Board finding health and safety not real reason for refusal and that employer discipline not unlawful in circumstances - Complaint dismissed - Employee seeking judicial review on ground that Board members' conduct give rise to reasonable apprehension of bias - Employee issuing summons to witness to Board member to secure evidence for use in judicial review application - Court concluding that summons an abuse of process and quashing it

Board Decision reported at [1990] OLRB Rep. Dec. 1213.

Ontario Court (General Division), Howden J., October 9, 1992.

HOWDEN, J.: The motion brought by the Ontario Labour Relations Board et al is to quash the Summons to Witness issued to David Patterson, a member of the said Board. The summons was issued to secure the evidence of Mr. Patterson on an examination under rule 39.03(1) for use in an application to the Divisional Court for judicial review brought by Jill Bettes and in respect of a motion by the Board in that proceeding to strike out portions of the applicant Ms. Bettes' Record and Supplementary Record. The motion and the judicial review application are awaiting the hearing and disposition of this motion.

The background necessary to understand this situation begins with the working environment of Ms. Bettes at Boeing Canada/DeHavilland Division, her employer. She complained to the Board that she had been disciplined by her employer for exercising her right to refuse to work under the Occupational Health and Safety Act, R.S.O. 1990, ch.0.1. She also complained about other actions of her employer being directed at her as reprisals for exercising her statutory rights. These matters arose from alleged smoking by others in or near Ms. Bettes' workplace area.

The Board convened a hearing, and concluded by dismissing her complaints. The Board panel was made up of the three persons named as respondents in the application for judicial review, one being the same David Patterson. The Board found against Ms. Bettes at least partially on grounds of credibility.

The applicant alleged in her application to the Divisional Court that the members of the Board's panel were biased against her based on certain conduct during the hearing. Ms. Bettes states that her employer was prosecuted in Provincial Court under the same legislation and on the same facts that were before the Board and was convicted and fined \$12,500.00 on each of two counts. She

asserts that at that trial the inspector under the Occupational Health and Safety Act, one John Harkins, testified and supported her version of events. He did not testify before the Ontario Labour Relations Board, though at first he appeared at the hearing, prepared and “willing to give evidence since he had been instructed to do so by his Ministry”, according to Ms. Bettes’ affidavit. The Summons to Mr. Patterson and this motion arise largely from the following passage in the affidavit of John Hiram Bettes, sworn on January 12, 1992 and filed in support of the allegations of bias and improper conduct filed in this proceeding:

“I asked him (Inspector Harkins) what happened that he didn’t testify before the Ontario Labour Relations Board and he told me that he was approached by a staff lawyer of his own union who told him that, for the best interest of the union, Harkins was not to testify. Harkins told me that he never asked the union to supply him with a lawyer or represent him in any way. Harkins also told me, at that time, that he knew that Board Member Patterson had approached Harkins’ union through Patterson’s labour connections to get them to stop Harkins from testifying. Harkins told me he knew of Patterson’s involvement but wasn’t in a position to prove it.”

“I have recently spoken to Inspector Harkins to see if I could get more information from him about his knowledge of Patterson’s activities and Harkins reiterated ‘I know it happened but you’re not going to be able to prove it.’ The context of our conversation was such that it was clear to me that Harkins had been told by his union officials of the request by Patterson but that they had also told him that they would deny it.”

The Summons to Witness issued to Mr. Patterson indicates clearly the direction of the intended examination. It directs him to bring with him all documents.

“...relating in any way to the issues in this Application for Judicial Review including telephone bills...logs...and any other documents relating to your attempt to use your connections to prevent John Harkins from testifying herein before the Ontario Labour Relations Board.”

During argument on this motion, I asked why Ms. Bettes did not simply require Inspector Harkins to testify before the Board by serving a summons upon him. I was informed that an inspector under the Occupational Health and Safety Act was not a compellable witness. No specific provision was cited. I have since found Sec. 63(3) of that Act which indeed states that an inspector is not compellable in any proceeding except under the Coroners Act,

“...respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the regulations.”

Mr. Goudge submitted for the Board that in order to require a member of a statutory tribunal to give evidence concerning his or her actions during the decision-making process the applicant must first establish a *prima facie* case or (as stated in his *factum*) “some probative basis for the allegations” to which the questioning would be relevant. If that test is not met, then the summons is an abuse of process which seeks to embark on an unwarranted fishing expedition. He also referred to Section 111 of the Labour Relations Act as creating at least a legal presumption of immunity for a tribunal member, if not a prohibition, against questioning in any civil proceeding unless the threshold test is met. He cited *Commission des Affaires Sociales v. Tremblay* (S.C.C., April 16, 1992); *Re Agnew and Ontario Association of Architects* (1987) 64 O.R. (2d) 8 (H.C.J., Div.Ct.); and *Ellis Don Limited v. Ontario Labour Relations Board and I.B.E.W., Local 894* (Ont.Ct., Gen.Div., Steele J., July 17, 1992).

Section 111 of the Labour Relations Act reads in part:

“Except with the consent of the Board, no member of the Board ... shall be required to give testimony in any civil suit or in any proceeding before the Board or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.”

Mr. Goudge, in referring to this as a presumption of immunity rather than a limited prohibition as it appears literally to be, obviously has considered the finding of Steele, J. in *Ellis Don*, supra. The Court ruled that an application for judicial review was a civil suit within that section; however, the section was held not to interfere with the overriding interest of the courts in seeing that principles of natural justice are adhered to.

Counsel for DeHavilland supported Mr. Goudge's submissions and argued briefly that Ms. Bettes and her counsel were indulging in speculation late in the day, after the judicial review proceeding had been perfected. The Board hearing concluded in December 1990, the Bettes application was brought in April 1991, and it was listed for hearing in late January 1992. Ms. Bettes affidavit was not filed until January 12, 1992.

For Ms. Bettes, Mr. Baker agreed that the cases indicate a protection for the deliberative process of a court or board. However, he submitted that neither he nor his client has any intention of penetrating the member's mental process of decision-making. He pointed out that this case deals with an allegation of witness tampering. The cases dealing with the need to protect judges and members of statutory tribunals from being questioned on their decisions or the process of reaching decisions are not relevant to the case at bar. He rejected his opponents' characterization of abuse of process, and stated that properly the burden should be on those attacking the summons where there is no attempt to get at the member's process of deliberation. He referred to *Re Canada Metal Co. Ltd. and Heap*, (1975) 7 O.R. (2d) 185 (Ont.C.A.) and *Re Agnew and Ontario Association of Architects*, (supra).

The rule under which the summons was issued, rule 39.03, applies to both a motion and an application. It reads:

"(1) Subject to subrule 39.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination.

(2a) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence.

(3) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial.

(4) The attendance of a person to be examined under subrule (3) may be compelled in the same manner as provided in Rule 53 for a witness at a trial."

Rule 39.03 confers a right on a party to a motion or application to examine a witness before the hearing, or, with leave, at the hearing. That right is not, however, an unqualified one. The Rule itself expresses several limitations. An examination under rule 39.03 is made expressly subject to the requirements of timeliness and reasonable diligence in subrule (2a) and to proper reply where a prior cross-examination has occurred (subrule 39.02(2)). And no such examination may occur at the hearing of the motion or application without leave.

In addition to the express controls in the rule itself, the decisions of the Court of Appeal in *Re Canada Metal Co. Ltd. and Heap*, Campbell J. in *Re Agnew and Ontario Association of Architects*, and Steele J. in *Ellis-Don Limited vs. Ontario Labour Relations Board and I.B.E.W., Local 894*,

supra, import evidentiary and relevance tests in the general application of the rule as well as a limited exemption and a somewhat higher evidentiary threshold where judges or members of administrative tribunals are sought to be examined. Mr. Baker is correct in saying that examinations are not normally permitted to enquire into how judges or tribunal members make their decisions. However, he is not correcting in implying that as long as he stays clear of penetrating the mental process, an examination under rule 39.03 is a virtual right without regard to relevance and some evidentiary basis to the issues being pursued.

First, in the *Re Canada Metal* case, the Court of Appeal referred at length to its decision on the predecessor of the current rule 39.03 in *Rene vs. Carling Export Brewing & Malting Co. Ltd.* (1927) 61 O.L.R. 495. The Court had pointed out in that case the need for some general and reasonable limits due to the broad wording of the rule. On appeals from an order setting aside subpoenas served on certain persons in the Toronto news media who allegedly had heard statements made by members of the local Board of Health responsible for reviewing the lead smelting operations of the company, the Court of Appeal held that, on an intended examination under then Rule 230,

“The evidence sought to be elicited must be relevant to the issue on the motion. If it is, there is a prima facie right to resort to Rule 230. That right must not be so exercised as to be an abuse of the process of the Court.”

The appeal was allowed and the examinations were permitted in *Canada Metal* because there was no suggestion to the Court of Appeal or the court appealed from that the issuance of the subpoenas was an abuse of process. The persons sought to be examined had allegedly heard and reported on relevant statements by the very persons against whom bias or prejudice was alleged in the company's application for prohibition.

On the other hand, in the earlier *Carling Export* case, a subpoena was issued to examine a person sought to be added as a co-defendant without the consent of the initiating plaintiff and without any basis in the evidence on the motion except that an agreement had been entered “which renders his presence necessary in order to enable the Court to adjudicate upon the questions involved in this action.” It appeared to the court that this was an attempt to use the examination as an additional discovery. The Court affirmed the setting aside of the subpoena as “an abuse of the Court's powers.”

Re Canada Metal stands for the proposition that there is a prima facie right to an examination under rule 39.03 provided the exercise of this right is relevant to the issues before the court and the stated issues have a reasonable evidentiary basis in the material filed; otherwise, the summons may be set aside as a fishing expedition and an abuse of the court's powers.

The other cases cited deal with a further control being developed in the case law over the right to examine under rule 39.03: the circumstances in which members of statutory quasi-judicial or adjudicative tribunals are compellable under this rule. The Supreme Court of Canada, in dealing recently with the duty of fairness owed by all administrative bodies, recognized the great variety, importance and number of tribunals. From hospital and medical boards to licensing, marketing, energy, social assistance, planning and labour boards, they “are a way of life”... “and the functions they fulfil are legion”. The Court then pointed out the very different functions of the numerous statutory tribunals, some being investigative, others prosecutorial, and still others being adjudicative. It concluded that although the duty of fairness applies to all, the extent of that duty would depend on the nature and function of the tribunal. Those boards that are primarily adjudicative in their functions are expected to comply with the standard appropriate to courts. *Newfoundland*

Telephone Co. v. Board of Commissioners of Public Utilities, (1992) 89 D.L.R. (4th) 289, (S.C.C.) at pp. 296-9.

The *Commission des Affaires Sociales vs. Tremblay*, supra, a case dealing with an adjudicative board process which it later held in breach of the rules of natural justice, the Supreme Court of Canada referred in passing to a "rule of deliberative secrecy". After referring somewhat enigmatically to some distinction in the standard of secrecy between courts and administrative tribunals, the Court stated, at p.13:

"Of course, secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice."

In the *Ellis-Don* case, Steele J. allowed a motion to compel the chair, vice-chair, and registrar of the Ontario Labour Relations Board to submit to an examination, where the information sought related to the Board's procedures in arriving at its final decisions and in particular the decision in question. He referred to Rule 39.03 as permitting examinations of witnesses before hearing of judicial review applications. The basis for the requested order and information was clear in that case - a self-described question of fact was decided one way in a draft decision of the hearing panel received by the applicant but it was decided differently in the final decision. This about-face apparently occurred after a review by the full board including members who had not been present at the hearing. Steele J. held at p. 10 that in those circumstances, a prima facie case to the above effect had been established, and therefore the applicant had "shown valid reasons to believe that the procedures followed denied it natural justice." *Ellis Don* was not a case of an attempt to question members of the hearing panel on their mental processes of decision making or even on their conduct during the hearing; the distinction was made between the former and matters of Board process.

Re Agnew and Ontario Association of Architects is an example of a clear case where the intended examination sought to inquire into the decision-making process of tribunal members who had decided against an applicant for licensing as an architect. Campbell J. held that the prima facie right to examine under rule 39.03 was subject to exception in the case of judges and members of administrative tribunals summonsed to answer questions about their decisions and "any aspect of the decision process". (p.16). He saw no reason for distinction in this regard. In the course of his decision, Campbell J. stated, at p. 15:

"There are some obvious cases where a subpoena would be justified. Statements or conduct outside the decision process, like expressing an opinion to the press, might render the tribunal member amenable to subpoena"; *Re Canada Metal Co. Ltd. and Heap*, supra. If the evidence sought relates to some matter collateral to the decision, something that is not inextricably bound up with the decision itself, the decision may be amenable to subpoena: *Re Clendenning*," (1976) 15 O.R. (2d) 97.

Very little authority was cited on the general compellability and the limits of compellability of tribunal members."

The latter statement is also true in this case.

Campbell J. concluded his decision in *Re Agnew* at p. 18 by also finding that a fishing expedition into non-decisional areas but lacking any basis of relevance represented an abuse of the Court's process.

Steele J. in the *Ellis-Don* decision likewise commented at p. 7 that such examinations are not to be used as fishing expeditions lacking any basis or relevance. In that case, he found that the applicant

had shown a change to an important point in the decision during the deliberative process of the Board after the hearing which bore on the issue of natural justice, and the appellant in these circumstances “should be able to present full information to the court at the hearing of the judicial review.”

This case is unlike the cases cited on compellability of tribunal members in that the questioning seeks not to penetrate the member's or the Board's decision-making process. It also appears to be not precluded by Section 111 of the Ontario Labour Relations Act. The protection of Section 111 is limited by its own terms only to testimony respecting information obtained by Board officials within the ambit of their duties and employment. Mr. Baker states that the examination of Mr. Patterson would be limited to the allegation that he tampered indirectly with a witness behind the scenes during a hearing before a panel of which he was a member. That conduct, if substantiated, could not be said to be within the ambit of information obtained in the discharge of his duties with the Board or while acting in the scope of his employment. As well, it is not similar to the fact situation in *Ellis-Don* where information on the Board's consultative process was sought. However, the following principles propounded and maintained by the respective courts regarding both the limits on rule 39.03 examinations generally and in the case of tribunal members are useful and relevant to this case. The establish a balance between unnecessary harassment of judges or tribunal members by unsuccessful parties and the need for some finality on the one hand, and the interest in the fairness and integrity, perceived and actual, of tribunal processes serving the public.

(i) Generally, there is a prima facie right to examine witnesses under Rule 39.03 provided the exercise of that right is founded on a reasonable evidentiary basis and relevance to the issues on the motion or application; relevance to issues merely raised by a party but lacking in any evidentiary bases is not sufficient.

(ii) At least in the case of primarily adjudicative boards like the Ontario Labour Relations Board, examinations of members may not touch on or inquire into their mental process of deliberation.

(iii) Where the inquiry is not within the ambit of (ii) but concerns process or conduct regarding or during hearings, valid reasons to the level of “obvious appearance” or “prima facie case” indicating a denial of natural justice should be required for examination of a board member; and

(iv) for these purposes, there should be no logical distinction between a purported examination of a judge and of a member of a statutory tribunal, at least one which is primarily adjudicative.

While Steele J. at one point referred to the test being lesser than the “strong prima facie case” test required on stay applications, *Ellis-Don* is limited to its facts and findings which include the presence of a reasonable prima facie case for believing that natural justice had been denied.

In the case at bar, the prima facie right to examine under rule 39.03 rests solely on the allegations in the affidavit of Mr. Bettes, sworn January 12, 1992, some 13 months after the conclusion of the Board hearing. The affidavit refers to two conversations with the inspector, John Harkins. From his affidavit, it appears that Mr. Bettes has no personal knowledge himself of the allegation of impropriety involving Mr. Patterson. Mr. Bettes' statement does not say when or how far apart in time these conversations were; however, it is clear that the affiant himself was not satisfied with the content of the first conversation, because he states “I have recently spoken to Inspector Harkins to see if I could get more information”, and the affidavit was not filed until a considerable time after the hearing.

What is clear from an examination of Mr. Bettes' statements is that Mr. Harkins' conclusion of wrongdoing by the Board member rests on nothing more than his own opinion. At no time does he

say that anyone told him of anything specifically done by Mr. Patterson to influence his not testifying; nor does he say that he knows directly of his own observation and memory of anything done by Mr. Patterson in this regard. Mr. Bettes merely states that he then drew a conclusion from “the context of our conversation” with Mr. Harkins that senior officials had told Harkins of the activity by Mr. Patterson.

We have then a mere opinion grafted on another opinion lacking any evidentiary basis to found a reasonable belief of involvement by Mr. Patterson. Is this enough to require a judge or a tribunal member to be subjected to cross-examination by counsel for an aggrieved party after a hearing? There is no *prima facie* case nor is there any evidentiary basis leading to more than mere speculation to which this examination could be relevant. And when I refer to “evidentiary basis”, I would include the presence of any hearsay statements which could pass the underlying principled test of reliability referred to by the Supreme Court of Canada in *Khan vs. The Queen* (1990) 59 C.C.C. (3d) 92 and in *The Queens vs. Smith* (unreported S.C.C. August 27, 1992). I do not use the word hearsay in a rigidly technical sense. Even hearsay statements of some reliability are completely lacking as to anything of the nature suggested done by Mr. Patterson. The real analogy for this case in terms of lack of evidentiary base is to the *Carling Export* case cited in the *Re Canada Metal* decision of which Orde J.A. stated:

“(The rule) is unquestionably very wide, but that alone indicates, I think, that resort to it must be reasonable. It must not be made an instrument to harass or annoy others unnecessarily, and there is in the Court an inherent power to prevent the abuse of its own process.”

It seems to me that in the interests of finality of decision and the continued integrity and independence of judicial and quasi-judicial decision-making, without fear or favour, the tests of reasonable and relevant evidentiary basis and *prima facie* case should apply here. Using only the former (the *Re Canada Metal* principles), the Summons to Witness to Mr. Patterson is an abuse of process, a fishing expedition into nothing more than speculation by two people late in the process. It may be that an examination of the person who allegedly made the statements to Mr. Bettes would be proper if it had been sought in a timely and reasonably diligent way; such alleged “information” as possessed by Mr. Harkins on this subject would appear to be outside the protection given him as an inspector under the Occupational Health and Safety Act. However, that is not before me.

For the foregoing reasons, the summons to witness to David Patterson is quashed. Any issue of costs may be addressed in writing to me, if necessary, before October 30th next either at the Court House in Barrie before October 16th, or later at the Regional Court building in Newmarket.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1992

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1341-91-R: Office & Professional Employees International Union (Applicant) v. Ticketmaster Canada Inc. (Respondent) v. John Drummond (Objectors)

Unit: "all employees of Ticketmaster Canada Inc. employed in the Phone Room as operators and as floor-walkers, Box Office ticket sellers, receptionists, and in the Mail Department, in the Municipality of Metropolitan Toronto, save and except assistant managers, supervisors, and persons above the rank of supervisor" (197 employees in unit) (*Having regard to the agreement of the parties*)

2298-91-R: Ontario Secondary School Teachers' Federation (Applicant) v. Wellington County Board of Education (Respondent)

Unit: "all office, clerical and technical employees of Wellington County Board of Education in the County of Wellington, save and except persons exercising managerial functions or employed in a confidential capacity in matters relating to labour relations pursuant to section 1(3)(b) of the Labour Relations Act and persons in bargaining units for which any trade union held bargaining rights as of October 10, 1992" (29 employees in unit)

4009-91-R: International Brotherhood of Electrical Workers', Local 120 (Applicant) v. E.C.M. Controls Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of E.C.M. Controls Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of E.C.M. Controls Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0090-92-R: Energy & Chemical Workers Union (Applicant) v. Dussek Campbell Limited (Respondent)

Unit: "all employees of Dussek Campbell Limited in the City of Belleville, save and except supervisors, persons above the rank of supervisor, office and sales staff, quality control and laboratory personnel and students employed during the school vacation period" (14 employees in unit)

0118-92-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Carosi Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Carosi Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Carosi Construction Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and the County of Simcoe and the District Municipality of Muskoka excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0180-92-R: Labourers' International Union of North America Local 247 (Applicant) v. Crane Canada Inc. (Respondent)

Unit: "all employees of Crane Canada Inc. at its Crane Supply Division in the City of Kingston, save and except Branch Manager, persons above the rank of Branch Manager, office, clerical, sales and technical staff" (2 employees in unit)

0232-92-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Dominion Construction Masonry (Respondent)

Unit: "all construction labourers in the employ of Dominion Construction Masonry in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Dominion Construction Masonry in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0233-92-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Dominion Construction Masonry (Respondent)

Unit: "all journeymen and apprentice bricklayers in the employ of Dominion Construction Masonry in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice bricklayers in the employ of Dominion Construction Masonry in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0649-92-R: Labourers' International Union of North America, Local 247 (Applicant) v. Grange W. Elliott Limited (Respondent)

Unit: "all field employees of Grange W. Elliott Limited engaged in surveying operations in and out of the City of Kingston, save and except field supervisors/office managers, persons above the rank of field supervisor/office manager, sales, office and clerical staff" (9 employees in unit)

0894-92-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Canadian Carpet Mills (Respondent)

Unit: "all Journeymen and Apprentice Marble, Tile, Terrazzo, Cement Masons and Resilient Floor Layers and their helpers, in the employ of Canadian Carpet Mills, in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0910-92-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Canadian Carpet Mills (Respondent)

Unit: "all Journeymen and Apprentice Marble, Tile, Terrazzo, Cement Masons and Resilient Floor Layers and their helpers, in the employ of Canadian Carpet Mills, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0939-92-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Canadian Carpet Mills (Respondent)

Unit: "all Journeymen and Apprentice Marble, Tile, Terrazzo, Cement Masons and Resilient Floor Layers

and their helpers, in the employ of Canadian Carpet Mills, in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0963-92-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Oro (Respondent)

Unit #1: "all employees of the Corporation of the Township of Oro, save and except foreperson, persons above the rank of foreperson, office, clerical and technical staff, students employed during the school vacation period and students employed on a co-operative or government sponsored work program with a community college." (16 employees in unit)

Unit #2: "all office, clerical and technical employees of The Corporation of the Township of Oro, save and except co-ordinator secretarial services, persons above the rank of co-ordinator secretarial services, students employed during the school vacation period and students employed on a cooperative or government sponsored work program with a community college." (5 employees in unit)

1161-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. The Millcroft Inn Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of The Millcroft Inn Limited in the Town of Alton employed in the Housekeeping, Kitchen and Dining Room Departments, save and except Department Heads, Managers, Assistant Dining Room Managers, Chefs, Assistant Chefs, persons above the rank of Department Head, Manager, Assistant Dining Room Manager, Chef and Assistant Chef, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, persons employed in Conference Centre and office and sales staff" (35 employees in unit) (*Clarity Note*)

1231-92-R: International Association of Bridge, Structural & Ornamental Iron Workers, Local 765 (Applicant) v. Pyrotex Ltée. (Respondent) v. Labourers' International Union of North America, Local 527 (Intervener)

Unit: "all ironworkers and ironworkers' apprentices in the employ of Pyrotex Ltée in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of Pyrotex Ltée in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1250-92-R: United Brotherhood of Carpenters and Joiners of America Local 93 (Applicant) v. Les Installations Germain Paradis Ltée. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Les Installations Germain Paradis Ltée. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Les Installations Germain Paradis Ltée. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1296-92-R: Association of Latinamerican Community Centre Employees (Applicant) v. Latinamerican Community Centre (Respondent)

Unit: "all employees of the Latinamerican Community Centre in the Province of Ontario, save and except directors and persons above the rank of director" (7 employees in unit) (*Having regard to the agreement of the parties*)

1340-92-R: International Brotherhood of Painters and Allied Trades, Local 205 (Applicant) v. Josip Karabogdan c.o.b. as Joe's Painting (Respondent)

Unit: “all painters and painters’ apprentices in the employ of Josip Karabogdan c.o.b. as Joe’s Painting in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of Josip Karabogdan c.o.b. as Joe’s Painting in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1367-92-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Armor Masonry and Precast Ltd. (Respondent)

Unit: “all journeymen and apprentice bricklayers, stonemasons plasterers and improvers in the employ of Armor Masonry and Precast Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice bricklayers, stonemasons, plasterers and improvers in the employ of Armor Masonry and Precast Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin; and in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (25 employees in unit)

1390-92-R: Glass, Molders, Pottery, Plastics and Allied Workers International Union (Applicant) v. Aero Environmental Limited (Respondent)

Unit: “all employees of Aero Environmental Limited in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, Quality Control Inspectors, Laboratory Technicians, Tooling Engineer, Traffic Manager and students employed during the school vacation period” (46 employees in unit) (*Having regard to the agreement of the parties*)

1442-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Bren Mechanical Contractors Limited (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Bren Mechanical Contractors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Bren Mechanical Contractors Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1460-92-R: Canadian Security Union (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: “all Security Guards in the employ of Meadowvale Security Guard Services Inc. at 5 Vicora Linkway in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

1466-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Windsor Match Plate & Tool Limited (Respondent) v Group of Employees (Objectors)

Unit: “all employees of Windsor Match Plate & Tool Limited in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (76 employees in unit) (*Having regard to the agreement of the parties*)

1483-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Beaver Lumber Company Limited (Respondent)

Unit: "all employees of Beaver Lumber Company Limited at 633 Parkdale Avenue North in Hamilton, regularly employed for not more than 24 hours per week, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff and students employed during the school vacation period" (44 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1485-92-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Armor Masonry and Precast Ltd. (Respondent)

Unit: "all construction labourers in the employ of Armor Masonry and Precast Ltd. in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1507-92-R: Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Marcor Personnel Inc. (Respondent)

Unit: "all employees of Marcor Personnel Inc. working in Oakville, Burlington and Mississauga, save and except supervisors and those above the rank of supervisor" (38 employees in unit) (*Having regard to the agreement of the parties*)

1508-92-R: Canadian Union of Travel Professionals (Applicant) v. Uniglobe Colonnade Travel Ltd. (Respondent)

Unit: "all employees of Uniglobe Colonnade Travel Ltd. in the Regional Municipality of Ottawa-Carleton, save and except Owner, persons above the rank of Owner and outside sales persons" (3 employees in unit) (*Having regard to the agreement of the parties*)

1509-92-R: Toronto Typographical Union #91, CWA 14030 (Applicant) v. Comda Services Limited (Respondent)

Unit: "all employees of Comda Services Limited at 77 Sheffield Road in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (45 employees in unit) (*Having regard to the agreement of the parties*)

1536-92-R: Retail, Wholesale and Department Store Union (Applicant) v. Beatrice Foods Inc. (Respondent)

Unit: "all employees of Beatrice Foods Inc. in the City of North Bay, save and except Depot Manager, persons above the rank of Depot Manager and office and clerical staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

1549-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Town of Bradford West Gwillimbury (Respondent)

Unit: "all employees of the Corporation of the Town of Bradford West Gwillimbury in its Works Department in the Town of Bradford West Gwillimbury, save and except Superintendent, persons above the rank of Superintendent, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit) (*Having regard to the agreement of the parties*)

1552-92-R: Service Employees Union, Local 183 (Applicant) v. St. Leonards Home Trenton Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of St. Leonards Home Trenton Inc. in the Township of Sidney, save and except Senior Counsellor and persons above the rank of Senior Counsellor" (10 employees in unit) (*Having regard to the agreement of the parties*)

1584-92-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Supercrete Precast Ltd. (Respondent)

Unit: "all construction labourers including cement finishers in the employ of Supercrete Precast Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers including cement finishers in the employ of Supercrete Precast Ltd. in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1604-92-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Township of Hornepayne Public Library (Respondent)

Unit: "all employees of the Corporation of the Township of Hornepayne Public Library in the Township of Hornepayne, save and except Chief Executive Officer and persons above the rank of Chief Executive Officer" (3 employees in unit) (*Having regard to the agreement of the parties*)

1609-92-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. George Jeffrey Children's Treatment Centre (Respondent)

Unit: "all employees of George Jeffrey Children's Treatment Centre employed in Residential Care in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, office and clerical staff, maintenance and custodial employees, and employees in the bargaining units for which any trade union held bargaining rights as of September 2, 1992" (26 employees in unit) (*Having regard to the agreement of the parties*)

1621-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ferma Underground Service Inc. (Respondent)

Unit: "all construction labourers in the employ of Ferma Underground Service Inc. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1644-92-R: Ontario Nurses' Association (Applicant) v. Board of Health Northwestern Health Unit (Respondent)

Unit: "all registered and graduate nurses employed by the Board of Health Northwestern Health Unit in its Home Care Program in the Districts of Kenora and Rainy River, save and except Supervisors and persons above the rank of Supervisor" (68 employees in unit) (*Having regard to the agreement of the parties*)

1653-92-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F.L. of L., C.I.O., C.L.C. (Applicant) v. Women's Place (St. Catharines & District) Inc. (Respondent)

Unit: "all employees of the Women's Place (St. Catharines & District) Inc. regularly employed for not more than 24 hours per week, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

1671-92-R: Labourers' International Union of North America, Local 1059 (Applicant) v. West London Paving Ltd. (Respondent)

Unit: "all construction labourers in the employ of West London Paving Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of West London Paving Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

3592-91-R: Christian Labour Association of Canada (Applicant) v. Mercedes Corporation c.o.b. as Chateau Gardens Queens (Respondent) v. London and District Service Workers' Union, Local 220 (Intervener)

Unit: "all employees of Mercedes Corporation c.o.b. as Chateau Gardens Queens in the City of London, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	15
Number of ballots marked in favour of intervener	1

0818-92-R: Ontario Public School Teachers' Federation (Applicant) v. The Oxford Board of Education (Respondent)

Unit: "all occasional teachers employed by The Oxford Board of Education in its elementary schools in Oxford County, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Board's and Teachers' Collective Negotiations Act*" (218 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	218
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of ballots marked in favour of applicant	34
Number of ballots marked against applicant	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1314-92-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 371487 Ontario Limited c.o.b. Oliver's Brasserie Bofinger (Respondent)

Unit: "all employees of 371487 Ontario Limited c.o.b. as Oliver's Brasserie Bofinger at 1507 Yonge Street in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, Head Chef, Sous-Chef, office and clerical staff" (41 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	33
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	14

Applications for Certification Dismissed Without Vote

2422-72-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Ottawa Civil Service Recreational Association (Respondent) (*Dismissed*)

0658-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. B. & T. Trimming Ltd. (Respondent)

2019-91-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Cloydon Construction Ltd. (Respondent)

0119-92-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Carosi Construction Ltd. (Respondent)

1259-92-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Fordyce and Frampton Electrical Contractors Limited (Respondent)

1559-92-R: Local 164 Draftsmen's Association of Ontario International Federation of Professional and Technical Engineers, A.F.L., C.I.O., C.L.C. (Applicant) v. Asea Brown Boveri Inc. (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3731-91-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Stephens and Rankin Inc. (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit #1: "all employees employed by Stephens and Rankin Inc. in the Province of Ontario as carpenters, carpenters' apprentices, truck drivers and construction labourers and in any classification in Schedule "A" hereto, save and except non-working foremen and persons above the rank of non-working foreman, excluding the industrial, commercial and institutional sector of the construction industry" (60 employees in unit) (*Clarity Note*)

0068-92-R: Labourers' International Union of North America, Local 506 (Applicant) v. Metro Concrete Floors (1990) Inc. (Respondent) v. Operative Plasterers' and Cement'Masons International Association of the United States and Canada, Local 598 (Intervener)

Unit #1: "all construction labourers in the employ of Metro Concrete Floors (1990) Inc.: (i) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario; and (ii) in all other sectors of the construction industry, save and except the industrial, commercial and institutional sector in O.L.R.B. Board Area #8; save and except non-working foremen and persons above the rank of non-working foreman, employees for whom bargaining rights are already held by the Applicant and/or any other affiliated bargaining agent of the designation of The Labourers' International Union of North America and The Labourers' International Union of North America, Ontario Provincial District Council and employees covered by the subsisting collective agreement between the Applicant and the Respondent" (7 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	2

0526-92-R: The Canadian Alliance of Airport Transportation Workers (Applicant) v. McIntosh Limousine Service Ltd., Air Cab Limousine (1985) Ltd., Aairport Limousine Services Ltd. (Respondents) v. Teamsters Local Union 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Intervener)

Unit #1: (without vote)

0527-92-R: The Canadian Alliance of Airport Transportation Workers (Applicant) v. Airlift Limousine Services Limited (Respondent) v. Teamsters Local Union 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Intervener)

Unit #1: "all dependent contractors of Airlift Limousine Services Limited in their limousine service working in and out of Metropolitan Toronto and the Regional Municipalities of York and Peel, save and except dispatchers, office and sales staff, supervisors, and those above the rank of supervisor" (52 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1344-92-R: United Steelworkers of America (Applicant) v. Exacta Precision Products Limited (Respondent)

Unit #1: "all employees of Exacta Precision Products Limited in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (65 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	73
Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	66
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	51
Number of ballots segregated and not counted	6

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0804-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Smiths Construction Company Arnprior Limited (Respondent) v. Labourers' International Union of North America, Local 527 (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of Smiths Construction Company Arnprior Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in all sectors of the construction industry in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (43 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	60
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names do not appear on voters' list	19
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	30
Number of ballots segregated and not counted	19

1162-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. The Hudson's Bay Company (Respondent)

Unit: "all employees of The Hudson's Bay Company at its Bay Store located at 3487 Lawrence Avenue East, Metropolitan Toronto who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Department Supervisors, persons above the rank of Department Supervisor, security staff, management trainees, office and clerical staff, students employed on a co-operative program with a school, college or university" (65 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	70
Number of persons who cast ballots	51
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	50
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	1

1258-92-R: I.W.A. - Canada (Applicant) v. Goulard Lumber (1971) Ltd. (Respondent)

Unit: "all employees of Goulard Lumber (1971) Ltd. at its sawmill, planing mill and mill yards in the Township of Springer, save and except Foremen, persons above the rank of Foreman, office, clerical and sales staff and students employed during the school vacation period" (41 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	44
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Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	4

Applications for Certification Withdrawn

1025-92-R: Labourers' International Union of North America, Local 527 (Applicant) v. Saramac Inc. (Respondent) v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Intervener)

1067-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ogden Allied Services Inc. (Respondent)

1313-92-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Etobicoke Board of Education Cafeterias (Respondent)

1605-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. S. Breda Plumbing Ltd. (Respondent)

1623-92-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Larry's Asphalt Paving Co. Ltd. (Respondent)

1665-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666 (Applicant) v. Oren Mechanical (Respondent)

1673-92-R: The Inzola Employees Association (Applicant) v. Inzola Construction (1976) Limited (Respondent)

FIRST AGREEMENT - DIRECTION

1355-92-FC: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. The Brick Warehouse Corporation (1352 Dufferin Street Toronto) (Respondent) (*Dismissed*)

1356-92-FC: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. The Brick Warehouse Corporation (City of Burlington) (Respondent) (*Dismissed*)

1357-92-FC: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. The Brick Warehouse Corporation St. Catharines (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1090-91-R: Toronto Typographical Union (Applicant) v. Alpha Graphics Limited, Universal Communications, The Laird Group Inc., Heads Up, Glenview Graphics Inc., Universal Fonts Inc., Studio E, Photoplex, Scan Graphics, McKim Advertising, By Design Type Studio and Vickers & Benson Companies Limited (Respondents) (*Withdrawn*)

1249-91-R: Toronto Typographical Union (Applicant) v. Cooper & Beatty Limited, Jannock Imaging Companies Limited, Atwell Fleming Printing, Batten Graphics, Batten Gravure, Cybergraphics, Fontshop, Headliners of Canada, Lasertone, Phaser Output, Swift-O-Type, The Composing Room, Cyberimages, Identicolour/Pinwheel, Excellence (Respondents) v. Graphic Communications International Union, Local 500M (Intervener) (*Withdrawn*)

2081-91-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Vince Masonry Ltd. and Disegno Construction Inc. (Respondents) (*Granted*)

3679-91-R: Sheet Metal Workers' International Association, Local Union 235 and Ontario Sheet Metal Workers' and Roofers' Conference (Applicant) v. 450928 Ontario Limited and 538580 Ontario Limited (Respondents) (*Granted*)

3983-91-R: International Brotherhood of Electrical Workers' Local 353 (Applicant) v. Keele Electric Limited and Colony Electric Limited (Respondents) (*Granted*)

3986-91-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 and Warren Cox on behalf of the trustees of the Iron Workers trust funds (Applicant) v. Cosnaut Steel Inc./M.M.J. Structural Steel and all related companies and John Zivanovic (Respondents) (*Withdrawn*)

4077-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sheldoon Associates Ltd. operating as Bancliffe Contracting & Construction, 203733 Ontario Inc. (formerly known as Bancliffe Contracting & Construction Limited) now operating as Bancliffe Interiors (Respondents) (*Dismissed*)

1019-92-R: United Food and Commercial Workers International Union Local 139 (Applicant) v. Hoffman Meats Inc., Fearmans Fresh Meats, Maple Leaf Foods Inc., F.W. Fearman Company Limited, 930161 Ontario Ltd., Fearman's Inc. (Respondents) (*Withdrawn*)

1216-92-R: United Brotherhood of Carpenters and Joiners of America Local 1072 (Applicant) v. Romatt Custom Woodwork Inc., and Brycedon International Inc. (Respondents) (*Withdrawn*)

1292-92-R: International Brotherhood of Electrical Workers, IBEW Construction Council of Ontario, and Local Union 586, IBEW (Applicant) v. Central Power Systems and R & B Electric, Blaine Hawkins, Bonnie Patricia McCoy (Respondents) (*Granted*)

1471-92-R: International Brotherhood of Painters and Allied Trades, Local 1904 (Applicant) v. 724029 Ontario Limited; 823727 Ontario Limited c.o.b. as Chenard Industrial Painting and Sandblasting and Morin Industrial Coatings Ltd. (Respondents) (*Granted*)

SALE OF A BUSINESS

1090-91-R: Toronto Typographical Union (Applicant) v. Alpha Graphics Limited, Universal Communications, The Laird Group Inc., Heads Up, Glenview Graphics Inc., Universal Fonts Inc., Studio E, Photoplex, Scan Graphics, McKim Advertising, By Design Type Studio and Vickers & Benson Companies Limited (Respondents) (*Withdrawn*)

1249-91-R: Toronto Typographical Union (Applicant) v. Cooper & Beatty Limited, Jannock Imaging Companies Limited, Atwell Fleming Printing, Batten Graphics, Batten Gravure, Cybergraphics, Fontshop, Headliners of Canada, Lasertone, Phaser Output, Swift-O-Type, The Composing Room, Cyberimages, Identicolour/Pinwheel, Excellence (Respondents) v. Graphic Communications International Union, Local 500M (Intervener) (*Withdrawn*)

2080-91-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Vince Masonry Ltd. and Disegno Construction Inc. (Respondents) (*Granted*)

3679-91-R: Sheet Metal Workers' International Association, Local Union 235 and Ontario Sheet Metal Workers' and Roofers' Conference (Applicant) v. 450928 Ontario Limited and 538580 Ontario Limited (Respondents) (*Granted*)

3983-91-R: International Brotherhood of Electrical Workers' Local 353 (Applicant) v. Keele Electric Limited and Colony Electric Limited (Respondents) (*Granted*)

3987-91-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 and Warren Cox on behalf of the trustees of the Iron Workers trust funds (Applicant) v. Cosnaut Steel Inc./M.M.J. Structural Steel and all related companies and John Zivanovic (Respondents) (*Withdrawn*)

4076-91-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sheldoon Associates Ltd. operating as Bancliffe Contracting & Construction, 203733 Ontario Inc. (formerly known as Bancliffe Contracting & Construction Limited) now operating as Bancliffe Interiors (Respondents) (*Granted*)

1019-92-R: United Food and Commercial Workers International Union Local 139 (Applicant) v. Hoffman Meats Inc., Fearmans Fresh Meats, Maple Leaf Foods Inc., F.W. Fearman Company Limited, 930161 Ontario Ltd., Fearman's Inc. (Respondents) (*Withdrawn*)

1217-92-R: United Brotherhood of Carpenters and Joiners of America Local 1072 (Applicant) v. Romatt Custom Woodwork Inc., Brycedon International Inc. (Respondents) (*Withdrawn*)

1291-92-R: International Brotherhood of Electrical Workers, IBEW Construction Council of Ontario, and Local Union 586, IBEW (Applicant) v. Central Power Systems and R & B Electric, Blaine Hawkins, Bonnie Patricia McCoy (Respondents) (*Granted*)

1471-92-R: International Brotherhood of Painters and Allied Trades, Local 1904 (Applicant) v. 724029 Ontario Limited; 823727 Ontario Limited c.o.b. as Chenard Industrial Painting and Sandblasting, Morin Industrial Coatings Ltd. (Respondents) (*Granted*)

CROWN TRANSFER ACT

1649-92-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Hallmark Building Cleaning (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2838-91-R: Jeff Martin (Applicant) v. Retail, Wholesale and Department Store Union AFL:CIO:CLC (Respondent) v. Reid's Dairy Company Limited (Intervener)

Unit: "all employees of Reid's Dairy Company Limited in the City of Belleville, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons employed in retail stores, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (29 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of respondent	10
Number of ballots marked against respondent	16
Number of ballots segregated and not counted	1

3384-91-R: Mark Vanwatteghem (Applicant) v. Ontario Sheet Metal Workers' and Roofers' Conference (Respondent) v. 450928 Ontario Ltd., c.o.b. as Olympic Mechanical (Intervener) (*Dismissed*)

3841-91-R: David A. Keast (Applicant) v. The Labourers International Union of North America and the Labourers International Union of North America, Ontario Provincial District Council, The Labourers International Union of North America, The Labourers International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local Unions 183, 247, 491, 493, 506,

527, 597, 607, 625, 749, 837, 1036, 1081 and 1089 (Respondent) v. Normbau 2000 Construction Inc. (Intervener)

Unit: "all construction labourers in the employ of Normbau 2000 Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Normbau 2000 Construction Inc. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (1 employee in unit) (*Dismissed*)

0337-92-R: Dave Pickford (Applicant) v. Labourers' International Union of North America Local 506 (Respondent) v. Pre-Eng Contracting Ltd. (Intervener)

Unit: "all construction labourers, including masons or bricklayers' tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work and all employees engaged in cement finishing, waterproofing or restoration work and all other construction employees engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, for whom the union has bargaining rights" (3 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

0338-92-R: Tim Cressman (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 785 (Respondent) v. XDG Limited (Intervener) (*Dismissed*)

1083-92-R: Sharon Woodcock, Carol Conlin, Betty Harrison (Applicants) v. IWA-Canada, Local 1-500 (Respondent) v. Saxon Athletic Manufacturing Inc. (Intervener)

Unit: "All (of the intervener's) employees in Brantford, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (21 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	15

1293-92-R: Steven Stack (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.-Canada) and its Local 40 (Respondent) v. The Children's Bookstore Limited (Intervener)

Unit: "all employees of The Children's Book Store Limited in the Municipality of Metropolitan Toronto and the Town of Vaughan, save and except the store manager, persons above the rank of store manager and librarian consultants who exercise managerial functions" (23 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	12

1392-92-R: Ted Fennell (Applicant) v. International Union of Operating Engineers, Local 772 (Respondent) v. The Brantford General Hospital (Intervener) (3 employees in unit) (*Granted*)

1519-92-R: Mark Atkinson (Applicant) v. Energy and Chemical Workers Union Local 593 (Respondent) v. Carter Welding Supplies Div. of Carter Niagara Inc. (Intervener) (14 employees in unit) (*Granted*)

1650-92-R: Jeffery Spence and Douglas Downey (Applicant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union AFL-CIO, CLC Local 28B (Respondent) (*Withdrawn*)

1682-92-R: Mark Atkinson (Applicant) v. Energy and Chemical Workers Union Local 593 (Respondent) v. Carter Welding Supplies div. of Carter Niagara Inc. (Intervener) (13 employees in unit) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1595-92-U: The Ontario Painting Contractors Association (Applicant) v. The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, and Ivan Ivankovici, and Sergio Pantarotto, and William Nicholls, and The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1891 (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1747-90-U: International Union of Operating Engineers, Local 793 (Complainant) v. Camaro Enterprises Limited (Respondent) (*Withdrawn*)

0429-91-U: United Food and Commercial Workers' International Union, Local 1000A (Complainant) v. Sobeys Inc. (Respondent) (*Granted*)

0914-91-U; 3177-91-U: London and District Service Workers' Union, Local 220 (Complainant) v. Strathroy Nursing Homes Ltd. (Respondent); Georgina Fleming (Complainant) v. London and District Service Workers' Union, Local 220 (Respondent) (*Withdrawn*)

1146-91-U: Melvin Leblanc (Complainant) v. The Schneider Employees Association (Respondent) v. J. M. Schneider Inc. (Intervener) (*Dismissed*)

1661-91-U: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Complainant) v. Torino Drywall Co. Ltd. (Respondent) (*Withdrawn*)

1973-91-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Vandenburg Contracting (1982) Limited (Respondent) (*Withdrawn*)

2968-91-U: Bricklayers, Masons Independent Union of Canada, Local 1 (Complainant) v. Vince Masonry Ltd., Disegno Construction Inc., Vince Baggetta and Carlo Baggetta (Respondents) (*Granted*)

3678-91-U: Sheet Metal Workers' International Association Local Union 235 and Ontario Sheet Metal Workers' and Roofers' Conference (Complainants) v. 450928 Ontario Limited, 538580 Ontario Limited, Anthony Gallant and Mark Vanwatteghem (Respondents) (*Withdrawn*)

3737-91-U: Joseph Babony (Complainant) v. Canadian Union of Public Employees Local 1280 (Respondent) (*Dismissed*)

3755-91-U: Labourers International Union of North America, Ontario Provincial District Council (Complainant) v. Stephens and Rankin Inc., Christian Labour Association of Canada (Respondents) (*Dismissed*)

3791-91-U: Pauline Black (Complainant) v. Amalgamated Clothing & Textile Workers Union Textile's Joint Board, Hamilton (Respondent) (*Withdrawn*)

3828-91-U: Adrienne Linda Jay Ross (Complainant) v. Office and Professional Employees International Union, Premier Bob Rae, Legislative Assembly, N.D.P. Caucus, Ellen Mackinnon, M.P.P. (Respondents) (*Withdrawn*)

3941-91-U: Ontario Public Service Employees Union (Complainant) v. La Societe de L'Aide a L'Enfance de Prescott-Russell (Respondent) (*Withdrawn*)

3979-91-U: Annamma Yohannan (Complainant) v. Joan Singh President The Workers Union of Queen Elizabeth Hospital (C.N.T.U.) (Respondent) (*Withdrawn*)

4125-91-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Christian Labour Association of Canada (Respondent) (*Withdrawn*)

0019-92-U: Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America (Complainant) v. Ontario Aggregate Haulers Benevolent Association and Angelo Natale (Respondents) (*Withdrawn*)

0185-92-U: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Complainant) v. Carosi Construction Limited (Respondent) (*Withdrawn*)

0323-92-U: Winne Quan (Complainant) v. Local 75 - Hotel Employees, Restaurant Employees Union (Respondent) v. Sheraton Hotel (Intervener) (*Dismissed*)

0343-92-U: Emilia Stranges (Complainant) v. Hospitality, Commercial & Service Employees Union Local #73 (Respondent) (*Withdrawn*)

0451-92-U: Mary Boudreault, Pat Boudreault and Ferguson McAvoy (Applicants) v. W.A. Construction and Union Local 183 International Labours (Respondents) (*Withdrawn*)

0453-92-U: The Canadian Union of Public Employees, Local 241 (Complainant) v. The Corporation of the City of Guelph (Respondent) (*Withdrawn*)

0542-92-U: The Canadian Union of Public Employees (Complainant) v. 958107 Ontario Incorporated (Respondent) (*Withdrawn*)

0593-92-U; 1139-92-U: United Food and Commercial Workers International Union, Local 175 (Complainant) v. Casatta Ltd. c.o.b. as Casatta/Peel (Respondent); United Food and Commercial Workers Union, Local 175 (Complainant) v. Casatta Ltd., c.o.b. as Casatta/Peel (Respondent) (*Withdrawn*)

0737-92-U: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Complainant) v. Central Electric Company (Respondent) (*Withdrawn*)

0741-92-U: Norman Hodgkinson (Complainant) v. United Steelworkers of America Local 4697 (Respondent) v. G.L. & V. Ontario Inc. (Intervener) (*Dismissed*)

0746-92-U: Mr. George Papadogianis (Complainant) v. United Steelworkers of America Local Union 2251 (Respondent) (*Dismissed*)

0747-92-U: Phil Konyon, Bob Humphrey, John Runtic and Dan Francesuit (Complainants) v. Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, Barry Wollmer, Karl Trieb, Jim Smith, Boyd Leckie Limited, Al Leckie, Jim Leckie and Don Wadge (Respondents) (*Dismissed*)

0811-92-U: Service Employees Union, Local 210 (Complainant) v. Dresden Rest Home Inc. (Respondent) (*Withdrawn*)

0841-92-U: Local Union 636 of the International Brotherhood of Electrical Workers (Complainant) v. St. Catharines Hydro Electric Commission (Respondent) (*Withdrawn*)

1018-92-U: United Food and Commercial Workers International Union Local 139 (Complainant) v. Hoffman Meats Inc., Fearmans Fresh Meats, Maple Leaf Foods Inc., 930161 Ontario Ltd., Fearman's Inc., F.W. Fearman Company Limited and Don Davidson, Ken Dew, Dan Cloutier and Kanti Makan (Respondents) (*Withdrawn*)

1112-92-U: International Union of Elevator Constructors, Local 50 (Complainant) v. Schindler Elevator Corporation (Respondent) (*Withdrawn*)

1136-92-U: University of Guelph (Complainant) v. University of Guelph Staff Association (Respondent) (*Withdrawn*)

1168-92-U: Duane Bowley (Complainant) v. United Steelworkers Local 6187 (Respondent) (*Withdrawn*)

1178-92-U: Southern Ontario Newspaper Guild, Local 87 (Complainant) v. Thomson Newspapers Company Limited, The Daily Mercury, a Division of Thomson Newspapers Company Limited and Steven Rhodes (Respondents) (*Withdrawn*)

1184-92-U: York University Staff Association (Complainant) v. York University and Professor Richard Faryon (Respondents) (*Withdrawn*)

1193-92-U: Fred S. Ducharme (Complainant) v. Canadian Union of Public Employees Local 503 (Respondent) (*Withdrawn*)

1196-92-U: Canadian Union of Public Employees, Local 906 (Complainant) v. Ajax-Pickering General Hospital (Respondent) (*Withdrawn*)

1215-92-U: United Brotherhood of Carpenters and Joiners of America Local 1072 (Complainant) v. Romatt Custom Woodwork Inc., Brycedon International Inc., Rosa DeMonte and Matteo DeMonte (Respondents) (*Withdrawn*)

1220-92-U: Metropolitan Toronto Demolition Contractors Inc. (Complainant) v. Delsan Demolition Limited, Environmental Abatement Services Inc., Domenic Santaguida, Luigi Santaguida, Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council (Respondents) (*Granted*)

1228-92-U: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Complainant) v. Millcroft Inn Limited (Respondent) (*Dismissed*)

1247-92-U: Laundry and Linen Drivers and Industrial Workers' Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. 592113 Ontario Limited c.o.b. as Olympic Metal Products, Morgese-Soriano Co. and Patina B. Canada (Respondent) (*Withdrawn*)

1267-92-U: Service Employees Union, Local 268 (Complainant) v. The Corporation of the Town of Marathon, Brian Thordarson, Ross Mitchell and April Knowles (Respondents) (*Withdrawn*)

1281-92-U: Champuben Patel (Complainant) v. Amalgamated Clothing and Textile Workers Union (Western Ontario Joint Board) and Levi Strauss & Co. (Canada) Inc. (Respondents) (*Withdrawn*)

1316-92-U: June Charlton (Complainant) v. Local 1804, International Association of Machinists and Aerospace Workers (Respondent) v. Hayes-Dana Weatherhead Products Inc. (Intervener) (*Withdrawn*)

1361-92-U: Lyman Crossman (Complainant) v. Mississauga Transit Union #1572 (Respondent) (*Withdrawn*)

1362-92-U: Teamsters Local Union No. 879 (Complainant) v. Crane Canada Inc. (Crane Supply Division) (Respondent) (*Withdrawn*)

1363-92-U: Peter Brum (Complainant) v. Local 75 H.E.R.E. of the Hotel Employees Restaurant Employees International Union A.F.L.-C.I.O.-C.L.C.-O.F.L. (Respondent) (*Withdrawn*)

1366-92-U: Carolyn Henry (Complainant) v. CUPE Union Local 3000 (Respondent) (*Withdrawn*)

1373-92-U: United Food & Commercial Workers, Local 459 (Complainant) v. Medical Centre (Respondent) (*Withdrawn*)

1377-92-U: Suzanne Varey (Complainant) v. Canadian Union of Public Employees Local 57 (Respondent) (*Withdrawn*)

1381-92-U: Allan Hunter, Vern Percy and John Coleman (Complainant) v. Good Year, United Rubber Workers Local 232 (Respondents) (*Withdrawn*)

1403-92-U: International Union, United Plant Guard Workers of America, Local 1956 (Complainant) v. Stinson Security Services Limited (Respondent) (*Withdrawn*)

1435-92-U: Canadian Security Union (Complainant) v. Meadowvale Security Guard Services Inc. (Respondent) (*Granted*)

1448-92-U: Sheet Metal Workers' International Association, Local 540 (Complainant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

1454-92-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Complainant) v. Cool Team Mechanical Inc. (Respondent) (*Withdrawn*)

1478-92-U: London and District Service Workers' Union, Local 220 (Complainant) v. Cedarwood Village (Respondent) (*Withdrawn*)

1531-92-U: Stephane Verreault (Complainant) v. Bakery, Confectionery and Tobacco Workers Union Re: Ron Piercy & Henry Cormann (Respondent) (*Withdrawn*)

1539-92-U: Rick Bellamy (Complainant) v. Wilson's Truck Lines Limited and The Canadian Union of Drivers and General Workers (Respondents) (*Withdrawn*)

1521-92-U: Jeanne M. Girard (Complainant) v. I.B.E.W. Local 636 (Respondent) (*Withdrawn*)

1541-92-U: Thomas J. Flint (Complainant) v. Retail, Wholesale & Department Store Union (Respondent) (*Withdrawn*)

1542-92-U: Rance Tremblett (Complainant) v. Wilsons Truck Lines Ltd. and The Canadian Union of Drivers & General Workers (Respondents) (*Dismissed*)

1551-92-U: Fred Hawara (Complainant) v. Wilson Truck Lines Ltd. (Respondent) v. The Canadian Union of Drivers and General Workers (Intervener) (*Withdrawn*)

1557-92-U: Jane Dupelle (Complainant) v. Cadbury Schweppes Powell Inc. (Respondent) (*Withdrawn*)

1568-92-U: Mr. John Edward Newton (Complainant) v. A.T.U. Local 1587 (Respondent) (*Withdrawn*)

1594-92-U: The Ontario Painting Contractors Association (Complainant) v. The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied

Trades; and Ivan Ivankovici; and Sergio Pantarotto; and William Nicholls; and International Brotherhood of Painters and Allied Trades, Local 1891 (Respondents) (*Withdrawn*)

1599-92-U: Mr. William Dimitruk (Complainant) v. Wilson Truck Lines Limited (Respondent) (*Withdrawn*)

1600-92-U: Mr. William T. Dimitruk (Complainant) v. Canadian Union of Drivers and General Workers (Respondent) (*Withdrawn*)

1619-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Franchise Owners Ottawa Limited c.o.b. Pizza/Pizza (Respondent) (*Withdrawn*)

1663-92-U: Jeff Metcalf (Complainant) v. O.P.S.E.U. (Respondent) (*Dismissed*)

1677-92-U: Marcor Personnel Inc. (Complainant) v. Canadian Brotherhood of Railway Transport and General Workers (Respondent) (*Dismissed*)

1733-92-U: John E. Newton (Complainant) v. Amalgamated Transit Union Local 1587 (Respondent) (*Withdrawn*)

1796-92-U: Canadian Brotherhood of Railway, Transport and General Workers (Complainant) v. KCB Courier (Division of RBW Holdings) (Respondent) (*Withdrawn*)

1808-92-U: Daniel Malloy (Complainant) v. Cooper's Crane Rental (1987) Ltd. and International Union of Operating Engineers, Local 793 (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO PROSECUTE

1746-90-U: International Union of Operating Engineers, Local 793 (Applicant) v. Camaro Enterprises Limited (Respondent) (*Withdrawn*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS

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A Monthly Series of Decisions from the
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- Unfair Labour Practice - Discharge - Discharge for Union Activity - Board not satisfied that employer's reasons for discharging grievor entirely free of improper motive - Evidence indicating that legitimate reasons co-existing with unlawful reasons - Complaint allowed - Reinstatement with compensation ordered
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0763-91-R; 0764-91-R; 0765-91-R; 0766-91-R; 0767-91-R; 0768-91-R; 0769-91-R; 0771-91-R; 1271-91-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. **Diamond Taxicab Association (Toronto) Limited**, Respondent; Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. **Kingsboro Taxi Limited**, Respondent; Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. **Beck Taxi Limited**, Respondent; Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. **Scarborough City Cab Company Limited**, Respondent; Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. **Associated Toronto Taxi-Cab Limited**, Respondent; Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. **Canadian Taxi Corporation**, Respondent; Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. **442714 Ontario Limited**, **A-Kwik Taxi Limited**, **Royal Taxi Limited**, **935772 Ontario Limited** c.o.b. as “**Royal Taxi**” and/or “**A-Kwik Royal Taxi**”, Respondents; Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. **Metro Cab Company Limited**, **Yellow Cab Inc.**, **Art’s Taxi Limited**, **PELS Investment Limited**, **A & A Taxi**, **ABC Taxi**, **City Wide Taxi**, **Go West Taxi**, **Northwest Taxi**, and **Don Mills Taxi**, c.o.b. as “**The Metro Cab Group of Companies**”, Respondents; Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant v. **Able-Atlantic Taxi (1989) Ltd.**, Respondent

Certification - Dependent Contractor - Board finding driver's working under roof sign of various taxicab brokers to be “dependant contractors”

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *W. A. Correll* and *E. G. Theobald*.

APPEARANCES: *James Hayes*, *Michael Blazer*, *Robert McKay*, *Harry Ghadban*, and *Guy Havell*, for the applicant; *Charles R. Robertson* and *Cliff J. Hart* for **Diamond Taxicab Association (Toronto) Limited**; *Carl Peterson* for **Kingsboro Taxi Limited**, **Beck Taxi Limited**, **935772 Ontario Limited** c.o.b. as “**Royal Taxi**”, and **Metro Cab Company Limited**; *Mark Crestohl*, *Tracey Lazareth*, and *Roseanne Angotti* for **Scarborough City Cab Company Limited** and **Able-Atlantic Taxi (1989) Ltd.**; *James G. Knight* and *Joseph Hadbavny* for **Associated Toronto Taxi-Cab Limited**; no one appeared on behalf of **Canada Taxi Corporation**.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER, E. G. THEOBALD; November 16, 1992

1. These are nine applications for certification in which pre-hearing votes have been conducted and the ballot boxes sealed. The applications pertain to numerous persons who drive taxicabs in Metropolitan Toronto under the roof sign (or “banner”) of a respondent taxicab broker. (For ease of reference, all of those persons (including owner/operators, lessees, and other operators) will generally be referred to generically as “drivers” in this decision.) The voting constituencies each consisted of “all employees of [a particular respondent] operating under [that respondent’s roof sign] in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, inspectors, dispatchers, call takers, maintenance staff, office and clerical staff, and multiplate/multicar owners/lessees.”

2. After the parties' representatives met with a Board Officer and a Pre-Hearing Vice-Chair in an attempt to narrow the issues in dispute (which include various matters pertaining to the bargaining unit descriptions, the lists filed by the respondents, and the relatedness of some of the respondents), the Board heard evidence and argument on the issue of whether the persons whom the applicant seeks to represent are "dependent contractors" (and, therefore, employees by virtue of section 1(1) of the *Labour Relations Act*, as contended by the applicant), or independent contractors (and, therefore, not employees under the Act), as contended by the respondents in all of these files except File No. 1271-91-R, in which the respondent Able-Atlantic (1989) Ltd. concedes that the persons driving under its banner are dependent contractors. (In that file, the only issue is the number and identity of the dependent contractors who were entitled to vote.) This phase of the proceedings occupied a total of fourteen hearing days during which the Board heard testimony from twelve witnesses and received 101 exhibits. Those exhibits included agreed statements of facts entered into by the applicant (also referred to in this decision as the "Union") and Diamond Taxicab Association (Toronto) Limited ("Diamond"), Beck Taxi Limited ("Beck"), Kingsboro Taxi Limited ("Kingsboro"), Metro Cab Company Limited ("Metro Cab"), and Royal Taxi ("Royal"), respectively. In making the findings and reaching the conclusions contained in this decision, we have duly considered all of the oral evidence (with due attention to the usual factors germane to the assessment of credibility), the documentary evidence, and the submissions of counsel. We have also assessed what is most probable in the circumstances of the case, and considered the inferences which may reasonably be drawn from the totality of the evidence.

3. The first witness called to testify in these proceedings was Bruce Bell, Diamond's President and Chief Executive Officer, who has approximately forty years of experience in the taxi industry. He provided the Board with an overview of the taxi industry in Metropolitan Toronto (also referred to in this decision as "Metro"), including the following written information upon which all of the parties participating in these proceedings are agreed:

OVERVIEW OF THE TAXI INDUSTRY IN METROPOLITAN TORONTO

LEGISLATIVE FRAMEWORK

The Province, through Section 377 of the Municipal Act allows municipalities to "license, regulate and govern owners and drivers of cabs, and taxicab brokers".

Metropolitan Toronto Council enacts the By-laws for this purpose under this authority but, for the most part, has delegated the power to raise and enforce these by-laws to the Metropolitan Licensing Commission (MLC) through its Legislation & Licensing Committee.

Attached hereto as Schedule "A" is the By-law.

METRO LICENSING COMMISSION:

Was formed in 1957 to license and regulate all trades, callings and businesses operating within the boundaries of Metropolitan Toronto.

Prior to that time taxi owners and drivers were licensed by the City of Toronto Police and by the individual police departments of the various townships and boroughs that comprised the geographic area which formed Metro.

The MLC is currently administered by two citizen appointees of Metro Council and two elected members of Council. It has a staff of approximately 135 persons and day-to-day operations are headed up by the General Manager.

The MLC, its General Manager and staff is the agency with which those persons engaged in the taxi industry most often must deal. The MLC is responsible for all

business licensing in Metro including such matters as Places of Amusement, Cartage Vehicles, Electrical Contractors, Pawnbrokers, Public Garages, Tow Trucks, etc.

As the By-law indicates, the MLC is concerned with such matters as:

- Maintaining waiting lists for prospective taxi owners;
- Involvement in contractual arrangements between lease drivers and owners;
- Overseeing the operation of a vehicle inspection station;
- Training of taxi drivers;
- Approving all sales of taxis;
- [Prescribing] the types of advertising allowed;

TAXI BUSINESS IN TORONTO

There are slightly less than 3,500 taxis licensed to operate in Metro Toronto. Ownership of licenses is not concentrated in that about half are held by persons (or corporations) having one license each. The remaining 1700 are probably held by an additional 600 persons or corporations. In total there are approximately 2,300 individual entities holding the 3,500 licenses.

Additionally, there are approximately 7,000 persons holding taxi drivers licenses, or coupled with owners, more than 9,000 individuals legally entitled to drive the 3,500 taxicabs within Metro.

Once a driver has completed and passed the required MLC taxi driver training course, and pays his fee, he is issued a drivers license.

A major portion of the taxi vehicles are associated with "Taxicab Broker" companies such as:

Able-Atlantic Taxi;
Beck Taxi;
Co-Op Cabs;
Diamond Taxi;
Kingsboro Taxi;
Kipling Cab;
Metro Cab;
Metro Group of Companies;
Sunnyside-Arrow Taxi;
and others.

Additionally there are several hundred taxis who have no affiliation with Brokers and are commonly called independents.

There are also several thousand more individuals who are employed either directly or

indirectly in the taxi industry. These being mechanics, dispatchers, telephone call takers, administrative and accounting personnel and others.

Metro Toronto has a population of approximately 2.2 million residents. But more than 4 times this amount of people visit Toronto for various reasons annually.

Metro Toronto commissioned two independent studies, one in 1982 and a further one in 1987, to arrive at a formula for the optimum number of taxicabs to serve the population. In 1982 Metro Toronto implemented a "new" (and more complicated) method of arriving at the number of taxicabs that should be licensed.

Weightings for the ratio were given to:

- Base Metro Population (relatively unchanged over the past ten years);
- Movement and number of passengers using the Airport (whether or not final destination was Metro Toronto);
- The province's GO Transit ridership;
- The population growth of other municipalities surrounding Metro Toronto;
- The estimated attendance at conventions and other events within Metro;
- and the recorded number of other visitors to Metro.

OWNERSHIP AND VALUE OF TAXICABS

There are basically three methods of obtaining title to an owners license:

1. To be issued a new license when the MLC is adjusting the amount of issues.
2. To purchase an existing taxicab and license on the open market.
3. To inherit an existing license through the estate of a deceased taxi owner.

NEW LICENSES:

From time to time the MLC adjusts the amount of licenses to serve Metro based on a formula mentioned previously. For this purpose the MLC maintains eligibility lists for prospective new taxi owners in seniority order.

There are two such lists in current use, known locally as the "Driver's List" and the "Owner's List".

Driver's List;

To become eligible to be placed on this list it is necessary to hold a taxi drivers license for a period of three years and to be actively involved in driving a taxi as a full-time occupation during the qualification period.

Once placed on the list, a taxi driver must remain licensed, must continue to drive a taxi as a full-time occupation and is required to file, with the MLC, an annual statutory declaration to swear that the majority of his income is derived from the taxi industry. He is also required to file a copy of his Income Tax Return for each year to confirm the declaration.

Failure to fulfil any of these requirements may result in being stricken from the list.

When a driver reaches the top of the list and is eligible, the license that is issued is probationary for an additional five years. During the probationary period he must maintain a good record, continue to drive his new taxi on a full-time basis and continue to file copies of his Income Tax forms with the MLC. He is allowed to utilize other taxi drivers to work with him, but must continue to drive himself.

In 1991, at time of issue the cost of the license was \$4,770. In 1992 this cost will be \$5,500 [which] is nominal by comparison to current market value. Additionally, of course, he must provide a vehicle and other taxi equipment, but he may not use or pledge the taxi license for collateral in any financing arrangement.

At the expiry of the five year probation he may sell his taxi [licence] on the open market or enter into permanent leasing arrangements with others.

Owner's List;

The owner's list has been officially closed since 1976. As a result of recent court decisions, however, there [have] been some adjustments to those eligible to be on the list. Additional names of some who may have been qualified at the time but were not included for various reasons have been adjusted.

This list includes owners, in seniority order, who held less than three taxi licenses in 1976, have continually remained licensed, and continue to earn income from the taxi industry.

Upon issue of a new license from this list the price of the license is the same as for the drivers. The probation period is also the same, but the requirement to actually drive that taxi is more relaxed in that the operation of the taxi must be under the personal management of the new licensee on a day-to-day basis. The license is not allowed to be leased, nor is any form of management contract for the new license allowed. At the expiry of the five year probation the same conditions apply in that the taxi [licence] may be sold or leased.

Currently, all issues of new taxi licenses are equally split between the two lists.

There have been many changes to the formulation of the lists over the years and to the distribution of new licenses.

- When the MLC was formed, new licenses were only issued to drivers;
- about 1963 this formula was changed to allow 90% to drivers and 10% to existing single cab owners;
- about 1966 (with a "point" system included) - 50% to drivers, 20% to fleet owners of more than 10 cabs, 20% to fleet owners from 2 to 9 cabs and 10% to single cab owners;
- about 1975 - 70% to drivers and 30% to owners of less than 3 cabs;
- and finally about 1985 to the current 50-50 split.

The probationary period for new cab owners has also been altered over the years. No probation was necessary in the early years because sales or transfers were not allowed; after allowing sales in about 1963 a one year probation period was imposed; with the change in issue lists in 1966 the probation period was changed to 3 years and finally, the current five year probationary license appeared about 1975.

Open Market;

The second method of acquiring an owners license is by purchase on the open market. From 1957 to 1963 no sales of individual taxis and licenses were allowed. It was possible at that time, however, to purchase an existing taxi company including the cabs, a dispatch office and licenses. With these restrictions in place it became popular to sell off shares of an existing taxi company roughly equivalent to the percentage of the contribution made to the company by the proceeds of one cab. To the unsuspecting, some of the same shares were sold many times over, and eventually the MLC decided to allow the sale of individual taxis.

Early sales netted the previous owner approximately \$2,000 for a taxicab, but prices escalated over the years. In 1970 the average price was about \$25,000; in 1980 about \$45,000, in 1986 approaching \$80,000 and still climbing.

When letting the contract for the study into the taxi business in 1987 the MLC made it quite clear that, in establishing a new formula for the issuance of taxi licenses, one of the goals should be to reduce the value of licenses on the open market. This portion of that study has been successful. After peaking at about \$95,000 in 1988, prices have been steadily declining and are currently about \$70,000 on average.

When the sale of a taxicab occurs, no true transfer takes place. The owners license of the seller is terminated and a new owners license is issued in the name of the buyer. All sales must be approved by the MLC and the [prescribed] papers must include a vehicle and equipment. The seller must relinquish all rights or connections with the taxi being sold, but again, the taxi license itself cannot be used by the purchaser as collateral for any financial or other purpose.

Many drivers, owners, or simple investors use the open market as the quickest way to gain ownership in the taxi industry.

There is no probation period for an owners license acquired on the open market - the newly licensed owner is allowed to operate the taxi in any fashion allowed under the By-law.

Inheritance;

The last method of acquiring an owners license is by inheritance.

Upon the death of a taxi owner the license is immediately transferred to the estate. The estate may then direct the wishes of the deceased either by continuing to operate the taxi, selling or disposing of it, or whatever may be contained in the will. Many widows, and/or other beneficiaries are currently licensed as taxi owners, whether or not they were previously involved in the taxi business. In these instances the taxi license is deemed to have an established value and is included in the assets of an estate for capital gains purposes.

WORKING ARRANGEMENTS

The actual taxi license plate that is issued to owners by the MLC is not always attached to a vehicle that is purchased and beneficially owned by the person or corporation listed in MLC records. While the by-law is explicit that the vehicle used as a taxi must be registered and insured in the name of the person or corporation whose name appears in those records, the true purchaser (and owner) of the vehicle may be different by utilizing allowed lease or "designated agent" agreements.

There are many forms and variances of working arrangements between owners and drivers. Some of the more common method used in the Toronto industry are as follows:

- Single cab owner owning his own vehicle may allow other licensed drivers to drive his cab for varying periods or shifts, for a flat, negotiated fee. The cost of fuel consumed during the period used is normally at the expense of the driver. Most or all other operational costs are usually assumed by the owner.
- Multiple cab owner owning vehicles may allow other licensed drivers to drive for varying periods (i.e. - weekly, daily, or pre-determined daily shifts) for a negotiated fee, or for posted, pre-set established prices. Costs of fuel and other expenses are usually shared between driver and owner as set out in the first example.
- Single or multiple cab owners may directly enter into leases with drivers or other owners where only the MLC License plate is attached to a vehicle owned by the lessee. The vehicle is registered in the name of the owner for the purposes of operating as a taxicab. In these instances the lessee assumes all costs for the operation of the taxicab and pays a flat fee to the owner for the use of the license.
- Single or multiple cab owners may designate an agent, or agents, to oversee the operation of his license or licenses. Agents so designated must themselves be licensed as either a taxi driver or a taxi owner by the MLC. The designated agent(s) would then have the same powers of the owner to enter into various forms of leases as referred to above. In any event, the vehicle which is used as a taxicab is always registered in the name of the owner [of the plate], regardless of true ownership [of the vehicle].

There is no limit on the amount of taxicab owners licenses that a designated agent may act for. Nor is there any restriction on the amount of taxi owners licenses a licensed taxi driver or owner may lease.

Some licensed taxi drivers may lease enough owners licenses to form fleets which they operate through other drivers. Some multiple taxi owners may lease each of their individual licenses to other drivers or owners either singly or in groups of licenses. Some multiple taxi owners may own and operate some of their own vehicles while leasing other licenses to others. In accordance with the by-law all designated agent agreements and/or lease agreements must be cancellable within seven days by either party.

Through leasing, the amount of persons or corporations licensed as taxi owners and the amount of persons or corporations who actually operate and own taxi vehicles is probably different. Without having access to MLC records [Bruce Bell] cannot estimate the amount of individuals who may own and operate the taxi vehicles themselves.

Some holders of more than one license simply operate as a taxi driver on one cab while leasing their additional licenses to others to operate.

There are many combinations and variances of leasing methods.

In addition to the matters described in that overview, the By-law governs such matters as advertisements, driver appearance and conduct, and vehicle age, mechanical condition, and appearance. For example, it requires cabs to be equipped with a spare tire, free from mechanical defects, clean, in good repair, and dry in their interior; requires drivers to be properly dressed, neat, clean, civil, and well-behaved; and prohibits drivers from overcrowding public cab stands, smoking without the

consent of the passenger(s), and (subject to certain specified exceptions) refusing to serve the first person requesting the cab's services.

4. Mr. Bell also provided some oral historical background information concerning the evolution of the taxi industry in Metro. Prior to the use of two-way radio becoming prevalent in 1947, there were many family operated taxi companies which hired drivers and paid them wages for driving cabs in their small fleets. Since most of those small companies could not afford to operate a radio dispatch system, when it became necessary to use this form of dispatch to remain competitive they banded together in groups of three or four companies to be radio dispatched from a single office. However, problems of favouritism developed because the fleet owners who took turns doing the dispatching tended to favour taxis in their own fleets. Taxicab brokers such as Diamond came into existence in the late 1940's in order to provide broader coverage, better service, and a means of further spreading dispatching costs. (Christie Taxi, the small taxi company owned by Mr. Bell's father, was one of the ten founding companies of Diamond Taxi in 1949.) Use of brokers resulted in some loss of control by cab owners over their drivers, as the owners no longer knew where their drivers were. Commission payments replaced wages as the means of remuneration for drivers, who would generally either retain two-thirds of the fares and pay for their own fuel, or retain only half of the total fares with the owner paying for fuel and all other expenses involved in running the cabs, including brokerage fees. Problems of favouritism, although not totally eliminated, were reduced by having the dispatching done by full-time dispatchers employed by the broker, and by having the broker own no cabs. In this regard Mr. Bell testified that the owners did not want the brokers owning cabs because it could lead to favouritism. To avoid the calculations necessary to determine how fares were to be split between owners and drivers under the commission system, flat fees and the other working arrangements described in the above-quoted overview evolved in the 1960's and became fairly common in the industry by the mid 70's.

5. Toronto historically had an elaborate system of exclusive cab stands or concessions, which became quite a competitive factor among brokers until the resulting substantial costs prompted them to agree to the elimination of such stands. After the By-law was amended to prohibit exclusive concession agreements, any operator was at liberty to service any cab stand, with the exception of certain stands (such as those at Union Station, the Royal York Hotel, and the King Edward Hotel) from which the By-law permitted to operate only cab owners with no contract, agreement, or arrangement with a broker. (For ease of reference, the owners of those cabs will be referred to as "independents" in the balance of this decision.)

6. During cross-examination by Union counsel, Mr. Bell acknowledged that the following constitute "common denominators" in the taxi industry throughout Ontario, North America, and many other parts of the world:

- (1) people can hail a cab from the street;
- (2) there are cab stands;
- (3) customers pay drivers;
- (4) taxis are regulated by local or other governmental authorities;
- (5) cabs are usually painted in distinctive colours;
- (6) there are usually dispatch offices, with or without computers;
- (7) taxis advertise in the yellow pages;

- (8) drivers can be quite transient, although this varies from city to city;
- (9) licences typically, but not always, have a capital value;
- (10) goodwill is of significance; and
- (11) there is licensing to protect the public and to prevent pandemonium.

7. Mr. Bell also acknowledged during cross-examination that association with brokers is a fundamental feature of the taxi industry in Metropolitan Toronto. He described the aforementioned independents as typically owning a single cab and a single plate, although he noted that some of them have been issued a second plate in the last five years when their names came up on the MLC owners' list. He further indicated that the number of independents has increased from approximately 400 to about 600 over the past five years.

8. Mr. Bell also provided the Board with detailed information concerning Diamond's operations. The amount of hearing time required for that portion of his evidence was significantly reduced through the introduction of the following statement of facts agreed to by Diamond and the Union:

AGREED STATEMENT OF FACTS

OF

DIAMOND TAXICAB ASSOCIATION(TORONTO) LTD.

INTRODUCTION

The parties hereto have agreed to the following statement of facts with the intention of narrowing and focusing the matters in dispute and of reducing the time required for the presentation of *viva voce* evidence in this matter.

The parties do not agree to or admit any facts other than those expressly indicated herein. The parties reserve the right to adduce evidence and to cross-examine as to any further or other alleged facts not expressly indicated herein, including facts intended to clarify or explain the matters indicated herein, subject to argument and the Board's ruling on the admissibility of such evidence.

Further, the parties do not intend to waive their rights to make submissions and to seek the Board's ruling as to the admissibility, relevance, weight, legal characterization or significance of or inference to be drawn from, any of the facts agreed to herein or of any other evidence which may be adduced by an party.

BUSINESS OF THE RESPONDENT

1. Diamond Taxicab Association (Toronto) Ltd. (hereafter referred to as "Diamond", the "Association", or the "Respondent"), is licensed as a "Taxicab Broker" under The Municipality of Metropolitan Toronto By-law #20-85 (hereafter referred to as "By-law # 20-85") which defines a "Taxicab Broker" as:

"any person who accepts calls in any manner for taxicabs used for hire and which are owned by persons other than himself, his immediate family or his employer".

2. Diamond is engaged in the business of providing services to its member taxicab operators. These services include a collection service (for taxi passengers who maintain charge accounts), order taking, and dispatch services. These services will be discussed in more detail under the heading "Financial Arrangements - Membership in the Association - Service Contract". The Association derives [its] revenues from member dues

and service charges, customer service charges, and miscellaneous revenues including the sale of promotional items.

3. At the time of the application for certification dated June 6, 1991, there were approximately 605 taxicabs in Toronto driving under the Association's banner, owned and/or operated by 299 members. Of these 299 members, 248 paid dues for, and owned and/or operated one car each. Many of these members continue to drive full time. The balance (51 members) paid dues for, and owned and/or operated 2 to 39 cars each. Many of these members continue to drive full time. A detailed breakdown of this is attached as Appendix "A".
4. Some of the 51 members who own and/or operate more than one taxicab may work out of various "garages". The term "garage" however is somewhat of a misnomer in that a garage is not necessarily a physical plant or location. It may include someone's office, home, etc.
5. The Association operates its dispatch service for Metropolitan Toronto with its head office located at 251 Queen Street East. While Diamond has the largest number of taxicabs operating under its banner in Toronto, it competes for business with several other large taxicab companies, including Associated Toronto Taxi-Cab Co-Operative (Co-op Cabs), Metro Cab Co. Ltd., Beck Taxi Limited, Kingsboro Taxi Limited, and others.

LICENSING AND LICENSES

6. Diamond does not in any way assist drivers in obtaining a taxi [driver's] license, either by sponsoring drivers, giving them financial assistance, or by co-signing applications of drivers. Further, in Toronto, drivers need no approval from an owner or Diamond to obtain a license to drive a taxicab, nor is Diamond required to complete any forms prior to a driver being able to obtain a taxi license. Pursuant to by-law 20-85, Schedule 8, Section 65 (5)(b), an owner, broker, or dispatcher shall, if requested by a driver provide a written statement indicating the period during which the driver provided taxi services. Diamond does, *if requested* by a member/lessee, sign the prepared form used by the Municipality of Metropolitan Toronto Licensing Commission indicating the dates for which the member/lessee paid dues to Diamond. Diamond signs the form as the person "to whom he provided service as a taxi cab driver".
7. In the Association, there are no restrictions from owners transferring or selling their taxi owners licenses to other individuals. Where an owner sells his taxi owners license and a new owner is desirous of coming into the Association, no prior approval is required. Diamond's service contract does have an assignment form attached to it. However, the service contract has not been amended in several decades, and the assignment form has not been used since at least 1977.

FINANCIAL ARRANGEMENTS

MEMBERSHIP IN THE ASSOCIATION-SERVICE CONTRACTS

8. The first step in becoming a member in the Association is to apply. As stated in the application for membership (see Appendix "B"), one must first be a taxicab owner or leaseholder of a taxi owners license. This is so because the Association does not own any taxicabs.
9. Once accepted into the Association, the taxicab owner and Association enter into a service contract. The service contract provides that the member is to pay the Association, in advance, a flat monthly fee, currently at \$340.00 per month. In exchange, the Association provides a computer dispatch service. Drivers are not under any contractual obligation to use the dispatch service. The service contract (see Appendix "C") also provides that the Association may operate charge accounts, (see below), as well as other services, which, for the most part, are no longer relevant.

OWNERSHIP OF TOOLS OF THE TRADE

10. Diamond does not own any taxicabs driven under [its] banner. Diamond does not provide owners with radios or meters. [Diamond's] flat monthly fee includes the lending of a roof light with the Diamond logo, Diamond decals, and the Gandalf mobile computer. Although the service contract requires the taxicabs to be painted in a particular way, Diamond does not provide this service, nor does it give any financial assistance to members to have their taxicabs painted in such a manner. As an incentive to join Diamond, however, the Association does allow a one-time initial reduction in the first month's dues.
11. Each taxi must be equipped with a meter and radio to be able to use the Gandalf computer. If a service contract was to be terminated, Diamond would remove its property; the Gandalf computer. The taxi, however, would still be equipped with a meter and radio which could be used with any other brokerage to which the owner may wish to become associated. Further, if a taxi were to be suspended from the dispatch service, the driver may continue to utilize the meter and derive income from street pickups. While suspended from the dispatch service, there is no abatement of the monthly fee referred to above.

THE COMPUTER SYSTEM

12. Diamond uses a fully computerized dispatching system which has been designed by Gandalf Systems to process calls received from individuals requesting taxicabs, and to send taxicab drivers to those individuals to fulfil their requests. The parties hereto do not agree as to whether or not the computerized dispatching system is the sole method of dispatching requests.
13. All of Metropolitan Toronto has been divided into geographical zones to allow taxicab drivers wishing to access the system to report their location in order to avail themselves of any business which may be close to them. This is accomplished by drivers coding in a sequence of keys on the mobile computers. That taxicab number is then placed by the base computer in a queue of available taxicabs in that geographical area.
14. The mobile computer, two-way radio and taxi meter in each taxicab are interconnected. The meter is connected so that when the meter is turned on, it is assumed that the taxicab is no longer available for new business, and a signal is sent through the computer via the two-way radio to the dispatch, informing it that the taxi has been engaged. The computer then removes the taxi number from the available taxi list. When a customer calls to order a taxicab, the [customer's] address and other pertinent information is keyed into the computer by the call taker accepting the call. The computer searches the address to find the matching geographical zone, and checks the queue of available taxi numbers that may be located in that zone. If there is an available taxi, the call information is transmitted to that taxi and the driver has 30 seconds to accept or reject the call. If accepted, the time is then logged. If rejected, the taxi number is removed from the queue, and the call is then offered to the next taxi in the queue. When a driver takes no action within 30 seconds, the call is automatically offered to the next taxi number and the taxi from which there was no response is removed from the queue.
15. Where no taxis are found in the geographical area, an automatic message is generally broadcast through the system stating that a call is available in a given zone. Drivers in or near the zone may then "book" their taxi into the zone in order to avail themselves of the fare.
16. When a driver picks up a fare for which he has been dispatched, the time that the taxi meter is turned on is logged against the call so that service levels to the customers may be recorded. The computer also logs the time that the meter is turned off, which indicates that the customer has been delivered to his/her destination. The fare is then deemed to be completed. The driver can then rebook into the system.

17. The system automatically generates various reports for every 24 hour period. These reports will be referred to in detail under the heading "Source of Work".

LEASE/LEASING

18. Diamond, as mentioned, owns no cars. Therefore, Diamond leases no cars to members or drivers. Member owners and operators however may lease their vehicles on a shift to shift, daily, or other basis to other drivers. Such drivers will pay the member owners and operators directly an agreed fee for the use of the taxi. Most often the arrangement is by way of a flat fee for time rented.
19. Subject to paragraph 9 of the Agreed Statement of Discipline, Diamond has no direct control over, or direct involvement in the leasing or sub-leasing of taxicabs to various drivers by its member owners and operators.
20. Bruce Bell, President of Diamond, and Bob Milkovich, Vice President of Diamond do act as "designated agents" (as defined in By-law # 20-85) for owners of 173 taxicabs, and, as such, do enter into leasing arrangements with other licensed drivers and owners. In such cases the driver or owner lessee purchases a vehicle for use as a taxicab, registers the vehicle in the name of the holder of taxi owners license, installs a taximeter and radio, and enters into a service contract with Diamond. At that time the driver or owner lessee becomes a member of Diamond and is subject to the same terms and conditions as laid out in the service contract for all other members.
21. To fulfil their obligations as designated agents, Messrs. Bell and Milkovich require that the lessees of these vehicles remain in good standing as members of Diamond. The lessees of these taxi owners licenses, under terms of the leases, are required to remain a member of Diamond, and should they wish to terminate their lease or service contract with Diamond, the vehicle's ownership is transferred back to them and another lessee for the taxi owner's license is sought.
22. The lease or rental fees from the individual lessees [are] collected by Diamond on a monthly basis and the agreed lease or rental fees to the taxi license owners [are] likewise paid from Diamond. An administrative fee for these transactions is retained by Diamond in addition to its normal monthly dues.

FARES

23. The meter rates are set by By-law #20-85. Therefore, Diamond has no say in fares except at the times of a public annual review held by The Municipality of Metropolitan Toronto Licensing Commission, where recommendations may be made by any interested party in respect of taxi fares.
24. The drivers are at risk for the payment of fares.
25. Diamond has no volume discounts, or corporate client discount rates. It is Diamond's understanding, however, that some drivers individually may have such arrangements with passengers with whom they often carry. Diamond has no control over this.
26. Diamond does have a pre-set flat rate arrangement with several clients for package deliveries. Where a customer may have daily repetitive deliveries, Diamond has set prices for such deliveries. These prices are always an overestimate of what the meter price would be and are usually agreed with the customer, in advance.

CHARGE COUPONS

27. Diamond has a system whereby a customer may charge his or her ride by way of a Diamond coupon (or chit). These coupons are available as a service to customers, and a service charge is levied to the customer for their use. (Customer service charges are 7% for the first \$500.00 of monthly use, and 3% for monthly use in excess of

\$500.00). It is the full meter fare that the coupon user must pay, and upon which the service charges are applied.

28. Only [a] member may cash coupons directly with Diamond.
29. Members may cash in their coupons in one of several ways. The coupons may be submitted daily or periodically, and deposited on credit towards the monthly member fees. At the end of the month, Diamond will deduct such coupons from the monthly member fee of \$340.00.
30. Alternatively, members can submit these coupons on an interim basis, and receive immediately the value of the coupons less 5%.
31. Aside from the coupons, Diamond does not request, nor does it require any financial disclosure from its member owners or drivers.

INSURANCE

32. Diamond does not provide or arrange for insurance for any of its members. Rather, it is the individual who is responsible for the operation of the taxicab that is responsible for obtaining insurance for that vehicle. Fleet or individual owners may arrange for insurance with whichever company they desire. Diamond is not involved with such decisions.
33. The service contract does provide that the Association may obtain either fleet or personal insurance. This clause however dates back to the 1950's when the service contract holder could join a life insurance plan. There remain approximately 30 members who take part in this insurance, but there have been no additional people insured pursuant to this section in several decades.
34. The provisions in the service contract regarding public liability insurance are excerpts from The Municipality of Metropolitan Toronto By-law. They are a Municipality of Metropolitan Toronto licensing rule, not a Diamond rule.

EMPLOYER DEDUCTIONS

35. Diamond makes no payments under the Unemployment Insurance Program, or Canada Pension in respect of its members or their drivers. Diamond makes no deductions or remissions to Revenue Canada for personal income tax of the members. Each member and driver is responsible for the calculation and payment of his own income tax.

ADVERTISING/PROMOTION

36. Diamond provides receipt cards bearing its logo to drivers for the purposes of providing passengers with receipts for payments. Some drivers, at their own expense, also carry personal business cards with the Diamond logo which they may hand out to passengers. This practice appears to be increasing as more and more taxicab drivers are using, at their own expense, cellular phones in order to allow clients to contact them directly.
37. In 1988, in an attempt to limit the use of cellular phones, the Board of Directors of Diamond passed a Resolution on September 29, banning cellular phones effective January 1, 1989. This Resolution provided that any drivers discovered with cellular phones would be suspended from all dispatch services until the phone had been removed. This Resolution was appealed by several members to the Board on November 29, 1988 and several members chose to terminate their relationship with Diamond, rather than discontinue the use of cellular phones. In 1989, although Diamond attempted to enforce this policy it was, for the most part, unsuccessful. The increased use of portable phones made it virtually impossible for Diamond to know whether a

vehicle was equipped with a cellular phone. As such, by the end of 1989, it was decided that the policy would no longer be enforced.

CONTINUOUS SERVICE

38. Drivers of member owners or operators have no contractual requirements with the Association to exclusively drive Diamond taxicabs.
39. Diamond member owners are not contractually precluded from operating taxis with other brokers in addition to Diamond.

SOURCE OF BUSINESS

40. By-law #20-85, Schedule 8, Section 56 requires every driver of a taxicab equipped with a two-way radio to keep the two-way radio in full operation throughout the period in which the driver is operating the taxi cab in the Metropolitan Toronto area. However, Diamond has no way of knowing whether a driver or owner is complying with this Section, nor is there an obligation on the part of a broker to ensure compliance contained in this Section.
41. The Gandalf Computer System generates various daily reports that are compiled automatically. For purposes of exhibiting the source of the drivers work, the Grand Summary of Fleet Drivers Usage Report is relevant.
42. Attached as Appendix "D" is a summary of this report, by month, from September 1990 to August 1991, inclusive. This summary has been manually prepared by Bruce Bell, President of Diamond, by totalling each days readings, and computing month end totals. On occasion, because of computer failures, etc. reports were not available and this is noted on the reports.
43. On page three of this Appendix is a year end summary of these reports, which indicates that in the period from September 1, 1990 to August 31, 1991, 1,096,823 calls were accepted through dispatch, 2,607,151 calls were flagged, or picked up on the street (as evidenced by the meter being turned on) with a total business of 3,703,974 calls. This indicates that 70.39% of the calls were street pick ups, and 29.61% were dispatch generated.
44. The Applicant Union and Diamond agree that the information recorded in the summary attached as Appendix "D" accurately reflects the information recorded by the computer. The Applicant Union, however, does not admit that such information completely and accurately reflects the actual numbers of transactions.
45. The parties do not agree to the precise nature of the correlation, if any, between the information contained in Appendix "D" and the proportion of driver income attributable, either directly or indirectly, to driving under the Diamond banner.

COMPUTER ORIENTATION

46. But for a volunteer 1½ hour session on the Gandalf Computer System, Diamond does not have any orientation requirements, or testing of drivers operating Diamond taxicabs. Any driver, regardless of which broker's logo he is driving under, may attend the session. The only requirement is that an individual must have a valid driver's or owner's license. Diamond imposes no further requirements.

APPENDIX "A"BREAKDOWN OF MEMBERSHIP

Number of Members	Number of Cars	Total Cars
248	1 Car Each	248
20	2 Cars Each	40
6	3 Cars Each	18
3	4 Cars Each	12
3	5 Cars Each	15
1	6 Cars Each	6
3	7 Cars Each	21
2	8 Cars Each	16
1	10 Cars Each	10
2	11 Cars Each	22
1	13 Cars Each	13
1	14 Cars Each	14
1	15 Cars Each	15
1	16 Cars Each	16
2	17 Cars Each	34
2	19 Cars Each	38
1	28 Cars Each	28
<u>1</u>	39 Cars Each	<u>39</u>
299		605

• • • •

APPENDIX "C"

DIAMOND TAXICAB ASSOCIATION (TORONTO) LIMITED

SERVICE CONTRACT No. _____

CONTRACT made in duplicate, in the City of Toronto, in the Province of Ontario, this day of ,
nineteen hundred and

BY AND BETWEEN:

DIAMOND TAXICAB ASSOCIATION (TORONTO) LIMITED

hereinafter called the

ASSOCIATION OR PARTY OF THE FIRST PART

AND

hereinafter called the

MEMBER OR PARTY OF THE SECOND PART

WITNESSETH THAT, for the consideration and upon the terms and conditions hereinafter set
out, the parties hereto mutually covenant and agree as follows, that is to say:

1. The Party of the Second Part hereby becomes a Member of the Association and, with respect to the motor vehicle presently operated by the Member (or any motor vehicle substituted there-
fore [sic]) hereafter known to the Association by the number of this Contract and for so long as
this contract remains in force, shall be entitled to all the services accorded by the Association to
its Members.

2. The Association shall maintain and operate such intercommunication facilities either by tele-

phone, radio transmission or otherwise as its Board of Directors may deem necessary or advisable for the receiving of calls from the public for the hire of taxicabs and for relaying such calls to its Members.

3. The Association shall provide such taxi locations as its Board of Directors may deem necessary or advisable for the benefit of its Members, and, to the extent permitted by law, its Members shall be entitled to make use thereof for the purpose of conducting their taxicab business.

4. The Association may, but shall not be obliged to operate charge accounts for the benefit of its Members in order to facilitate the transportation of passengers by them on credit, and, in the event that the Association does so, the Members shall grant credit only to such persons, firms or corporations as may from time to time be approved by an officer of the Association.

5. The Association may, but shall not be obliged to furnish additional services as the Board of Directors of the Association may deem necessary or advisable, such as agents and starters, traffic surveys, personnel records and advertising, for the benefit of its Members.

6. The members shall pay to the Association in advance on the 1st day of each month or on Monday of each week in consideration for its services under this contract such monthly or weekly amounts as may from time to time be determined by the Board of Directors.

7. The Association, as a service and for the benefit of its Members, may but shall not be obliged to establish for such term as the Board of Directors of the Association may deem expedient a plan of group insurance whereby, with respect to the motor vehicles covered by their respective contracts with the Association, the Members are at least able to comply with the requirements of the proper licensing authority in that respect, and in the event that such a plan is established by the Association, the Member shall pay the premiums for such insurance for his benefit in such manner as the insurer may determine.

8. The Association, as a service to its Members, may, but shall not be obliged to establish for such term and under such conditions as its Board of Directors may deem expedient a plan of group insurance whereby the Members and any taxicab chauffeur or chauffeurs employed by them may be indemnified against loss resulting from injuries suffered while operating the motor vehicles covered by the respective contracts of the Members with the Association or while otherwise on duty, and in the event that such a plan is established by the Association, the Member shall pay the premiums for such insurance in such manner as the insurer may determine.

9. The Member shall provide public liability and property damage insurance for his car of not less than \$300,000 coverage for each occurrence and shall provide (if possible) that the Association shall have the protection of such insurance policies. In the event that any claim is made against the Association by reason of or in connection with any act or omission on the part of the member or any chauffeur, employee, agent, representative or servant of the Member's car or under any contract of carriage, the Member hereby agrees to indemnify the Association and to hold it harmless from and against any such claim in principal, interest and costs.

10. The Member shall install and maintain on the roof of his cab a roof light in the form and wording from time to time approved by the Association. Such roof light shall be furnished to the Member by the Association in return for a deposit of \$ and such roof light shall be returned in good condition to the Association by the Member on the termination of this contract and the Member shall be entitled to receive back his deposit. The Member covenants and agrees with the Association that no other name but the name of the Association shall be displayed anywhere on or in his cab, and that the number of the cab in the Association, which shall be the number of this service contract, shall be displayed prominently on both sides of the cab and on the rear portion of the roof, and that the cab will be painted in the standard colours of the Association, which are Omaha orange and black. The Member covenants and agrees with the Association that he will not operate or permit his cab to be operated after the termination of this contract with such roof light or the name of the Association or the distinctive colours and markings of the Association displayed anywhere on such cab.

11. It is distinctly understood and agreed between the parties hereto that neither the Member nor any chauffeur operating any motor vehicle of the Member is an employee, agent, represen-

tative or servant of the Association in connection with the control, management, and/or operation of any motor vehicle for which a service contract is held by him in this Association.

12. Neither the Member nor any chauffeur, employee, agent, representative or servant of the Member shall have any authority to bind the Association. In the event that any claim is made against the Association by reason of or in connection with any act or omission on the part of the member or any chauffeur, employee, agent, representative or servant of the Member, the Member hereby agrees to indemnify the Association and to hold it harmless from and against any such claim in principal, interest and costs.

13. The radio equipment in the Member's cab so long as this contract is in force shall be of a nature and kind satisfactory to the Association, and shall be maintained by the Member in operation and in good order and condition, and with crystals adjusted to such frequency or frequencies as may from time to time be assigned to such cab by the Association and the Member shall in the event of any change in such frequency or frequencies provide himself with crystals capable of being used on such changed frequency or frequencies. The Member covenants and agrees with the Association that he will observe and perform all rules, regulations and orders which may from time to time be made by proper authorities having licensing authority and jurisdiction over mobile radio equipment and frequencies, and that any breach of this covenant or agreement on the part of the Member shall entitle the Association to forthwith cancel this service contract. The Member hereby covenants and agrees with the Association that he will pay all costs in connection with the operation and maintenance of the radio equipment on his cab, and will pay any license fee which may be necessary for the radio equipment in his cab. The Member hereby covenants and agrees with the Association that he will not operate his taxicab after the termination of this contract with a crystal or crystals capable of being used on any of the frequencies from time to time assigned by the proper authorities for use by the Association.

14. This contract shall be and remain effective for a period of one year calculated from the date hereof, and unless otherwise terminated in accordance with the provisions hereof shall be automatically renewed from year to year, provided and it is hereby agreed that:

- (1) The association may by arbitrary decision of its directors or their nominee or nominees, either:
 - (a) Cancel such service contract upon twenty-four hours' notice in writing, mailed to the Member at his address as it appears upon the books of the Association, or
 - (b) Suspend immediately upon oral notice to the Member the Member's rights under this service contract, for any period up to but not exceeding one month, and during the period of suspension the cab covered by this service contract shall not be operated as a Diamond Taxicab or be entitled to any of the services of the Association, but the Member's dues to the Association shall nevertheless be paid for the period of such suspension.
- (2) The Member shall have the right to cancel this contract at any time when not in default hereunder on three days' notice in writing given to the Association but shall not be entitled to any adjustment or remission of the fees due the Association for the month in which such cancellation occurs.

and, in the event of any such termination, the Member shall immediately return to the Association any badges or other equipment which may have been loaned to him by the Association.

15. The Association will use its best endeavours to relay all calls received by it to its Members but will not be responsible to the Members for any error made in relaying any such call.

16. This Contract shall be assignable by the Member only on completion of the form of assignment appearing at the back of this Contract, the payment of such transfer fees not in excess of Five Hundred Dollars (\$500.00) as may from time to time be determined by the Board of Direc-

tors of the Association and the acceptance and approval thereof in writing by a person duly authorized thereto by the Board of Directors of the Association.

• • • •

[The other appendices to the Diamond agreed statement of facts have been duly considered by the Board but omitted from this decision, as it is unnecessary to reproduce all of the data contained therein.]

9. Diamond has nine directors, all of whom are members of Diamond with the exception of one person (who is not a member but who owns plates which are leased to members of Diamond). The persons who are undisputedly in the employ of Diamond include call-takers and dispatchers. Diamond spends thousands of dollars annually on promotion and advertising designed to attract customers and members. In addition to advertising in the "Yellow Pages", it places advertisements in the Downsview Canadian Forces Base Directory, Canadian Business Life Magazine, Taxi News, and various other publications.

10. There were approximately 400 taxis operating under the Diamond banner in 1986 when it introduced computer dispatching. That number grew steadily to slightly over 600 in the ensuing five years. In 1991 it ceased to increase but remained fairly stable. The turnover rate for members is generally about 15 to 20 per month, with most of the cars driven by them remaining under the Diamond banner with new members paying dues in respect of them. At least one individual who is a member of Diamond and has a cab operating under that banner also operates a cab under the banner of "Royal Taxi", one of Diamond's competitors. Another member of Diamond runs some of his cars as "independents". However, most multiple owners have all of their cars under a single banner. There are also a few drivers who rent a cab operating under Diamond's banner one week and a cab operating under a different banner the next week. However, this is quite rare.

11. To become a member of Diamond, the owner or lessee/operator of an owner's licence (also referred to herein as a "plate") fills out an application form requiring information such as names, addresses, telephone numbers, and licence numbers of the licence owner and the lessee/operator. The application form also specifies that the "cab(s) must be painted, numbered and stencilled in the regulation Diamond Taxi colours before [they] start to operate". Although Diamond tries to ensure that the advance painting obligation is fulfilled, it is not always successful and will often give a new member a month to have the car painted. If the car is seen on the road without the required colours, Diamond will contact the member to ask when the car will be painted. The car may be temporarily suspended from the dispatch system if it is not painted by then. If it becomes obvious to Diamond that the member is not going to get the car painted, Diamond will cancel the service contract. Diamond imposes this requirement because cabs painted in that manner serve as "travelling billboards" which attract the eyes of prospective taxi users and encourage them to telephone Diamond for taxi service.

12. As an incentive to join Diamond, the \$340 monthly fee is reduced to \$140 for the first month to partially offset painting costs. (Fees for a particular month are also sometimes reduced by Diamond on a discretionary basis when the cab is not on the road due to illness or accident.) The member pays \$340 per month for each of his or her cars operating under the Diamond banner. Thus, a member who has ten such cars pays \$3,400 per month. (If a member has a plate leased to an operator who operates under the banner of another broker, that will not be reflected in the Appendix "A" table to the Diamond agreed statement of facts.)

13. New members arrange for the \$1500 mobile taxi computer provided by Diamond to be installed in their taxis at their own expense. They also bear the cost of having the cab equipped with a meter and a two-way radio. These two items cost approximately \$1100, but are generally

leased. The roof light which Diamond lends to a new member is valued at \$45, which is the amount of the deposit required in respect of it. If a former member refuses to stop using the Diamond roof light and colours after leaving Diamond, the company will refer the matter to the MLC (as this is prohibited by the By-law). Diamond will also provide any member with a credit card imprinter upon payment of a deposit and signing of an agreement stipulating the rules under which it is to be used. Members submit credit card vouchers to Diamond, which in turn submits them to Robin Hood Taxi, the source of the imprinters. After verifying their value, Robin Hood Taxi issues a cheque to Diamond, which in turn issues cheques to the members who submitted the vouchers. Any voucher that proves to be invalid is returned without payment to the member who submitted it.

14. Signals between the mobile taxi computer and Diamond's base computer are transmitted over the cab's two-way radio. When the system is functioning properly, the mobile computer sends a signal to the base computer each time the taxi meter is turned on or off, so that the dispatch system will be aware of whether the cab is occupied or unoccupied. However, some members have installed "cheat switches" which permit their meters to be activated without signalling the base computer, thereby enabling them to accept street pick-ups (also referred to as "flags" or "flagged fares") without losing their place in the computer queue. Such switches can also be used to create a "fake no show" when a driver picks up a dispatched fare, falsely enters it as a "no show", and then uses the "cheat switch" to enable the meter to be activated for the dispatched run without signalling the base computer and triggering a removal from the queue. Since the use of those switches was impairing the fairness of its dispatch system, at the time of Mr. Bell's testimony in February of 1992 Diamond was in the process of having "meter cheater devices" installed at its expense on a mandatory basis in each of the cabs operating under its banner, in an attempt to eliminate that unfairness.

15. The use of cheat switches, and the fact that drivers sometimes (illegally) service street pick-ups without turning on their meters (a practice known in the industry as "high flagging"), has resulted in the figures set forth in paragraph 43 of the above-quoted Diamond agreed statement of facts understating the number (and percentage) of flagged fares, and overstating the percentage of dispatched calls. However, this is counterbalanced to some extent by the fact that some calls are "manually dispatched" and do not go through the computer. This happens on an authorized basis where, for example, Diamond is called upon to transport eyes from the donor bank to a hospital and wants to be very sure of the driver who is given that run, or where a caller wishes to be driven to the United States and Diamond seeks to ensure that there will not be a problem with the driver at the border. It also frequently, although not invariably, occurs when a call is received requesting a trip to other destinations outside Metro. The dispatch computer is also sometimes bypassed on an unauthorised basis where a dispatcher or call-taker improperly "siphons off" a good run and relays it to a particular driver via cellular phone or two-way radio on the basis of kinship or in return for monetary or other benefits. If detected, the dispatcher or call-taker involved will generally be dismissed by Diamond because such actions impair the integrity of the dispatch system.

16. Both the By-law and service contract which Diamond enters into with each of its members require that the member provide public liability and property damage insurance for his or her cab. The amount of insurance required used to be \$300,000, but this has been increased to a million dollars under the By-law. (As of the time of the hearing, Diamond's standard form service contract had not yet been revised to reflect that increase.) Diamond's concern about members having such insurance is based upon the possibility that someone injured in an accident involving a cab operating under Diamond's banner may seek to obtain relief from Diamond, as has in fact occurred in several cases. (In one such case in which a pedestrian was allegedly struck by a Diamond cab while crossing an intersection, the Ontario Court of Justice declared that Diamond was

not an owner of the vehicle for purposes of the *Highway Traffic Act*, as it did not have dominion and control over the vehicle. Consequently the action against Diamond was dismissed in a judgment dated October 11, 1990 by Wren J. in *Stoica v. Diamond Taxicab Association (Toronto) Limited et al.*)

17. As indicated in paragraph 35 of the Diamond agreed statement of facts, Diamond makes no Unemployment Insurance or Canada Pension Plan payments in respect of its members or their drivers, and also makes no deductions or remissions in respect of their personal income tax. It is also clear from the evidence that Diamond's members are considered by the Workers' Compensation Board to be independent operators not covered by the *Workers' Compensation Act*.

18. Drivers who attend the computer orientation session described in paragraph 46 of the Diamond agreed statement of facts are given a sixty-two page drivers' handbook containing detailed information about the company's policies, procedures, computer system, and zone maps. Mr. Bell's letter of welcome in that booklet reads, in part, as follows:

....

Diamond Taxi owns no cabs - it is an association for taxi owners and operators. Our function is to attract customers for our taxi owners, operators, and their drivers, and provide dispatching service to them. We also supply a credit service for taxi customers to ensure a stable, and repeat, clientele. It is necessary for all of us to supply these customers with prompt, preferential, and reliable taxi service - simply because it pays to do so. We try to ensure that there is a fair and equal distribution of all calls to all Diamond Taxis, regardless of ownership....

From the moment that you start to drive a Diamond Taxi, all of Diamond's customers become your customers. You are, regardless of the financial arrangements made with the owner of the cab which you are driving, in business for yourself in partnership with Diamond. You will be expected to follow Diamond's rules, but we have developed these rules in the interest of our customers, owners, and drivers, using our long history and experience to guide us.

....

19. Diamond also communicates information to its members about policies and procedures by means of occasional newsletters. In its May-June 1990 newsletter, Diamond warned drivers that because of complaints received from charge account customers, any driver who refused a fare when "first up" at a cab stand would receive a two-day suspension from all posts (i.e., would be unable to book onto a post and receive dispatched calls from there for two days). When this failed to alleviate the problem, drivers were advised in the September 1990 newsletter that the penalty would be increased to a four hour suspension from the entire dispatch system, and that if Diamond continued to receive complaints concerning any particular taxi, it would urge customers to assist it in laying a complaint with the MLC.

20. In the July 1990 newsletter, Diamond familiarized members with the rules and duties applicable to its newly acquired Wheel-Trans contract with the TTC. That newsletter also indicated that because of the importance of that contract (which was expected to generate 80 to 120 new trips per day, with the possibility of many more if performed correctly), Diamond would impose a six hour suspension from its dispatch system on any driver failing to live up to the prompt and professional standards promised by Diamond to the TTC, with longer suspensions for repeat offenders. In a follow-up article in the August 1990 newsletter, Mr. Bell indicated that a one-hour suspension would be levied on drivers who failed to enter the appropriate computer code upon picking up a Wheel-Trans passenger (in order to record the exact time of the pick-up). Warnings about suspensions for slow Wheel-Trans service and adjustment of excessive fares on Wheel-Trans coupons were included in the September 1990 newsletter.

21. In the December 1990 newsletter Mr. Bell called attention to complaints which had been received from two downtown locations. One of those complaints involved a report of two Diamond drivers getting into a fist fight in front of customers. Those complaints prompted the following comments by Mr. Bell in that newsletter:

This kind of reputation our company does not need! We are using inspectors now at both locations to ensure that proper service is being entered. Whenever the service is anything less than professional, we are levying pretty severe penalties against the offenders.

In the January/February 1991 newsletter, Mr. Bell reported that 162 suspensions had been applied for the use of "cheat switches", that anyone discovered using one would be suspended until it was removed, and that longer suspensions would be imposed on repeat offenders.

22. Diamond's rules and policies are designed to protect its goodwill, maintain a fair and equal distribution of dispatched calls, and fulfill its responsibilities under the By-law. Diamond enforces its rules and policies by means of penalties which generally involve suspensions from access to the dispatch system. Those policies, and the typical penalties associated with their violation, are the subject matter of a further statement of facts agreed to by Diamond and the Union:

Agreed Statement of Facts Re:

Discipline of Drivers and

Control Over Working Conditions

[The first three paragraphs of this agreed statement are identical to those in the agreed statement quoted in paragraph 9 of this decision, and have been omitted here to avoid repetition.]

1. Diamond has several policies regarding the conduct of drivers operating under the Diamond roof sign. Some of these policies relate to the operation of Diamond's radio dispatch system, while others relate to the quality of service provided to customers generally. Violations of most policies result in the imposition of penalties, which may consist of suspension from access to the dispatch system for a definite or indefinite time. These policies are not "hard and fast" rules; rather, there is a considerable degree of discretion exercised in their application. These infractions, and the typical penalties associated with them, include:

- (a) Booking into an area or post while not in that location.

Two hour suspension from dispatch system for persistent infractions

- (b) Booking into an area or post while engaged in transporting any passenger or parcel.

Two hour suspension from dispatch system for persistent infractions

- (c) Drivers are required to maintain a neat and clean appearance at all times. Beards, "message" T-shirts, and shorts are discouraged.

Policies relating to personal appearance are very rarely enforced - in most cases, the driver will merely be spoken to about it and asked to correct the problem.

- (d) Weather permitting, exterior of cars must be clean.

Suspension from dispatch system until clean car shown at Diamond Head Office

- (e) All cars must be painted according to Diamond's colour scheme, with Diamond Taxi stencils applied to both rear doors and trunk.

Warnings, suspensions from dispatch system, and termination of owner's service contract for persistent violation

- (f) Failing to be courteous to customers.

Suspension from dispatch system for a discretionary period of time.

- (g) When serving Bell Canada corporate account customers, failing to ensure that passengers wear seat belts, and that passengers get safely inside at their destinations. When serving Wheel-Trans account customers, failing to escort passengers to and from door and taxicab.

Suspension from serving the account in question, for a discretionary period of time.

- (h) Failing to properly fill out account customers' charge coupons, or overcharging for charge account fares.

No reimbursement to member for fare.

- (i) Rejecting a fare offered by the dispatch computer.

Removal from queue in all zones and posts. The Respondent does not agree with the characterization of this policy as disciplinary.

- (j) Failing to respond within thirty seconds to a fare offered by the dispatch computer.

Removal from queue in zone or post until expiry of pre-set time limit. The Respondent does not agree with the characterization of this policy as disciplinary.

- (k) "Fast meter" after dispatched fare where customer calls back.

Two hour suspension from dispatch system. The Applicant does not agree that "fast meters" are penalized only in the circumstances indicated.

- (l) "Scooping" a parcel or passenger which has been dispatched to another car.

Suspension from dispatch system for discretionary period of time.

- (m) Failing to service an order which has been accepted by the driver.

Two to six hour suspension from dispatch system

- (n) Failing to deliver a parcel promptly.

Suspension for discretionary period of time from obtaining dispatched parcel runs.

- (o) Failing to pick up a dispatched fare promptly.

Drivers are told to call the office with an explanation. If explana-

tion not accepted, two to six hour suspension from dispatch system. Discretion is exercised taking into account weather and traffic conditions and other factors.

- (p) Overloading (i.e., too many cars) on posts.

Warning, followed by two to four hour suspension from dispatch system for persistent infractions.

- (q) Using "cheat" switch.

Suspension from dispatch system until switch removed.

- (r) Inadequate or slow service of Wheel-Trans fare.

Six hour suspension from dispatch system

- (s) Other customer complaints.

Discretionary discipline

- (t) Having cellular telephone in taxicab.

This policy is no longer enforced.

3. Some of the above-mentioned policies can be enforced by drivers reporting, by means of special computer codes, violations committed by other drivers. The mobile computer terminals in all cars are capable of showing the driver the identification numbers of the first three cars booked into a post.

4. Some policies are enforced by the dispatch computer automatically, or by a Dispatcher, Shift Supervisor, or Manager.

5. Some of the foregoing policies are enforced by Diamond through a system of inspectors, who are specially authorized drivers. There are approximately 20 such inspectors, who receive cards identifying them as such. Inspectors complete no paperwork and receive no compensation in respect of their activities as inspectors. Their identities are known generally to most drivers who work under the Diamond sign. These inspectors report violations to the dispatch office, which can result in suspension from the dispatch system without prior notice to the driver. There are special computer codes reserved for the use of inspectors for such reporting purposes. In addition, the computer terminals in inspectors' cars are modified to display additional information, not available to other drivers, about the status of other cars within the dispatch system.

6. Some suspensions from the dispatch system are imposed at the request of Diamond members, or at the request of the Metropolitan Toronto Licensing Commission.

7. In addition to the imposition of suspensions from the dispatch system, drivers may be required to attend at Diamond's office to discuss alleged infractions of the policies or customer complaints.

8. When a car is suspended from the dispatch system, or when a customer complaint is received by Diamond, a paper copy of the order is produced, and is filed for future reference by the Dispatch Manager. These papers are filed by the month of occurrence, and not by drivers' or members' names or licence numbers.

9. In cases of serious or repeated infractions or customer complaints, drivers may be banned, either indefinitely or for a specified period, from driving any car under the Diamond roof sign. On occasion, Diamond may notify the owner of the taxicab driven by the offending driver, and may in addition notify several of its members having the largest fleets, of the identity of the "banned" driver. Diamond does not systematically notify all its members in such cases.

10. An average of approximately ten to fifteen suspensions from the dispatch system, including those referred to in Paragraph 6, occur per shift, although as many as eighty have occurred in one shift.

11. The imposition and duration of suspensions from the dispatch system are discretionary, and may be varied according to severity or frequency of offences. Dispatchers, Shift Supervisors, Dispatch Supervisors and Managers can manually cause the dispatch computer to impose or terminate a suspension from the dispatch system. A driver may call the Dispatch Supervisor to offer an explanation and to request that a suspension from the dispatch system be lifted. The driver may appeal the Dispatch Supervisor's decision to the General Manager, Vice President, or President.

12. Diamond imposes no restrictions on a driver picking up "flag" fares while under suspension from the dispatch system.

"Fast meter" refers to a situation in which an operator who has accepted a dispatched call turns on the meter and then turns it off again within three minutes. Although this sometimes occurs legitimately on a very short run, it usually involves a situation in which the driver is attempting to get off the call. The "inspectors" referred to in paragraph 5 of that agreed statement are generally drivers who have been driving under the Diamond banner for many years and who are interested in maintaining good order within the company.

23. As indicated in paragraph 9 of that agreed statement, in cases of serious or repeated infractions or customer complaints, drivers may be banned from driving under the Diamond banner. If a member continues to use a banned driver after being directed to refrain from doing so, Diamond may cancel the member's service contract. Although this does not occur frequently, it has happened on occasion.

24. As indicated in paragraph 6 of that agreed statement, suspensions from the dispatch system are sometimes imposed at the request of a member. In such circumstances, the driver is sent a computer message to call the member and is then suspended from receiving any dispatched calls until after the member advises Diamond that the requested contact has been made.

25. Drivers who mishandle a parcel delivery by, for example, delivering it to the wrong address or failing to deliver it promptly, may be suspended from dispatched parcel deliveries for a week or other period of time which Diamond determines to be appropriate. When Diamond receives a complaint from a customer about these or other matters, it uses the computer to determine the number of the cab involved and to send a message instructing the driver to telephone the dispatch office. If there is no response from the cab, Diamond may telephone the member who pays dues for that cab. It also has the option of suspending the car from the dispatch system until after the driver contacts the dispatch office. If the supervisor or dispatch manager is unable to resolve the complaint, an appointment will be made for the driver to see Diamond's Vice-President and General Manager, Bob Milkovich.

26. Suspensions from access to a broker's dispatch system usually produce the results desired by the broker. Even a brief suspension gets the driver's attention and generally dissuades the driver from continuing to violate a broker's rule or policy because such suspensions reduce the driver's income by depriving him or her of opportunities to make money. Although a driver suspended from the dispatch system can continue to "play the street" and pick up "flags", this is generally far less remunerative than servicing dispatched calls in combination with "playing the street". Moreover, the obligation to pay dues to the broker continues unabated during such suspensions. Evidence adduced by the Union indicates that drivers tend to "play the street" during suspensions not exceeding two hours but that they tend to take the car off the road and cease driving during longer suspensions. The evidence also indicates that some drivers prefer dispatched calls

over flag fares for personal safety reasons. Moreover, during recessionary times, dispatched calls are more stable than “flags”. Thus, the financial impact of a suspension is heightened during a recession.

27. In addition to the options described in paragraphs 29 and 30 of Diamond’s agreed statement of facts (quoted in paragraph 9 of this decision), Diamond’s customer charge coupons (“chits”) can be used to purchase fuel for cabs at certain gas stations which are permitted by Diamond to accept chits and to subsequently obtain payment for them from Diamond. Some charge account fares are obtained by drivers through the dispatch system; others are obtained from the street when a person with access to a Diamond charge account flags a Diamond cab and uses a chit to pay the fare. In either instance, the availability of such fares is one of the factors which prompts members to pay dues to Diamond for the privilege of operating under its colours and, thus, constitutes part of Diamond’s goodwill. The same is generally true of “lock-ups”, in which a driver enters into an arrangement to regularly transport a passenger (or parcels) without going through the dispatch system. Since most lock-ups involve persons with a Diamond charge account or who originally obtained the driver’s services as a result of a dispatched call, they typically also come to the driver as a result of Diamond’s corporate goodwill.

28. Mr. Bell told the Board that he did not know how much Diamond’s members earned, nor whether the value of the average dispatched fare was greater than the average flagged fare. He produced documentation indicating that the average value of the chits submitted by members in respect of corporate charges during the period in 1991 from the start of May to the end of September was approximately \$17.40, but he was unable to indicate whether the average cash fare would be less or more than that.

29. Although the By-law requires every broker to “ascertain the name of every driver driving taxicab in respect of which the ... broker has any arrangement or agreement for the accepting of calls for service”, it appears from the evidence adduced before us that brokers are generally unable or unwilling to comply with that requirement. Indeed, this and other evidence supports Mr. Bell’s assertion that “some parts of the By-law are enforced more than others.” Unless a dispatcher or member of management has occasion to contact a driver about an alleged infraction or other matter, Diamond does not generally know who is driving any particular Diamond taxi at any particular time. Although Diamond has the capability of implementing a driver identification system through its dispatch computer, it has not elected to do so. Thus, although Diamond had a list of its members at the time it received notice of the Union’s application for certification, it did not have a list of their drivers. After it was notified of the application, Diamond compiled such a list by asking each of its members to provide it with the names of persons whom they knew to have been driving their cabs within the applicable time frame. After vetting them for duplication, those names were combined with the names of members known to drive their own cabs under the Diamond banner. However, Mr. Bell told the Board that he has no real confidence in the accuracy of the resulting list that was filed with the Board on behalf of Diamond.

30. Evidence concerning Associated Toronto Taxi-Cab Limited was adduced through its General Manager, Joe Hadbavny. That company (which for ease of reference will be referred to by the name of its banner, “CO-OP”), is also a licensed taxicab broker providing its members with services similar to those provided by Diamond. In addition to deriving revenue from dues paid by members and service charges paid by the approximately three thousand customers who have charge accounts with it, CO-OP operates a gasoline and propane pool, selling fuel to taxis and other (retail) purchasers.

31. Four hundred and twenty-five cabs operate under the “CO-OP” banner, including 168

for which Mr. Hadbavny's son Daniel is the designated agent (through CO-OP's Transportation Management Services Division, of which he is the Manager). Those 168 cabs are leased out at rates set by Daniel Hadbavny in consultation with his father. CO-OP (through CO-OP Transportation Management Services) pays Unemployment Insurance premiums for the drivers of the approximately 60 or 65 of those cabs which are leased to drivers on a shift basis. All of those cars which are leased on a shift driver or package basis (and some of the other taxis operating under the CO-OP banner) are insured by an insurance broker which, as part of CO-OP's risk management program designed to maintain relatively low insurance rates, has an employee on CO-OP's premises to review drivers' abstracts and conduct driving tests in order to evaluate prospective drivers. CO-OP has sixteen member companies and an additional 160 individual cab owners as members. It has an ownership interest in three of its member companies, which have a total of nineteen cabs (all of which are included in the 168 for which Daniel Hadbavny is the designated agent). CO-OP has eight office employees and twenty dispatch employees. The latter are represented by a local of the applicant trade union.

32. Although CO-OP does not have a written service contract, its relationship with its members is very similar to that which exists between Diamond and its members. Persons applying for membership in CO-OP are required to fill out an application form which reads as follows:

APPLICATION FOR MEMBERSHIP IN CO-OP CABS

NAME CAR NO.

ADDRESS SOC. INS. NO.

..... TEL. NO.

..... Postal Code

I, THE UNDERSIGNED, HEREBY AGREE TO ABIDE BY ALL THE RULES AND REGULATIONS OF CO-OP CABS, as follows:

Official Colours: "Vermillion Red" for the body including door posts and the four quarters including wheel rims, option for wheel rims only can be painted black. "Air Force Yellow" for the roof, hood and the entire trunk lid. The decals for the upper door panel on the rear doors are mandatory.

Roof Light: The roof light is at all times the property of Co-Op Cabs. The monies that are paid for the roof light shall be returned less depreciation upon termination in Co-Op Cabs, the amount to be determined by management.

Cellular Phones: Cellular phones are not allowed in Co-Op Cabs

Car Washes: Cars must be washed by 11:00 A.M. when car washes are called. Failure to do so will result in no orders until cleared by the office or your garage.

Dress Code: A copy of the Official Dress Code of Co-Op Cabs is attached and made part of this Agreement. Any offending car that is reported will result in a suspension and the operator will be assessed additional \$25.00 on dues for each offence.

Disciplinary Action: If you commit any misdemeanors on the road, or there are service complaints, you will be asked to appear before management for disciplinary action which could result in a warning, a fine, a suspension, or dismissal out of Co-Op Cabs. This applies to owners, lessees and drivers.

Charge Coupons: All charge coupons must be filled out completely, otherwise they will not be accepted. You can choose to either be paid in cash (less 5% discount) or

be given a receipt which is payable the first day of the month after the full month following. Whenever you have accumulated \$150.00 worth of coupons, you must turn them in. The office is open to accept your coupons from 9:00 A.M. to 3:30 P.M.

Charges from the 1st to the 15th day of the month must be turned in on the 17th, except when the 16th falls on a Friday, then you must come in on the 16th. Charges from the 16th to the end of the month must be in on the first working day of the following month.

Credit Cards: We accept Visa, Master Card and American Express, payable to you in cash only. The discount rates are:

Visa & Master Card - 5%

American Express - 10%

Dues: Dues must be paid not later than the first day of each month.

A shareholder pays \$260.00 per month with a reduction of \$20.00 if the gas quota is met.

An "associate member" (non-shareholder) pays \$289.00 per month with a reduction of \$20.00 if the gas quota is met.

The first month's dues will be free for cars joining Co-Op for the first time. The following amounts are due and payable initially:

Computer installation cost	-	\$108.00
Radio license	-	36.00
Total		<u>\$144.00</u>

Gas Quota: The period covered is the 21st of the month to the 20th of the following month.

Gasoline powered cars - Single shift	\$285.00
Double shift	400.00

Propane powered cars - Single shift	\$200.00
Double shift	270.00

Shares: Open for licensed taxi owners only. An associate member is not eligible to purchase a share until he has operated out of Co-Op Cabs for a period of six months. At this time, he appears before our Board of Directors for admission. Whether or not he is passed depends on his conduct as a taxi driver, his driver record re accidents and the extent of his purchase of gas and oil from our service station at 560 King St. West.

The advantages of being a shareholder are: You pay lesser rate of dues than an associate member; you participate in the profits of the company; and you receive a Death Benefit Insurance coverage of \$7,000.00.

Participation: A shareholder is eligible to participate only if his cab is operated by himself or is leased or operated by Brant-King Cab Co. Ltd. which is a wholly-owned subsidiary of Associated Toronto Taxi-Cab Co-Operative Ltd.

I SHALL GIVE AT LEAST ONE MONTH'S NOTICE OF INTENTION TO LEAVE THE COMPANY. I FULLY UNDERSTAND THAT MANAGEMENT RESERVES THE RIGHT TO EXPEL ME FROM CO-OP CABS ON A ONE DAY'S NOTICE IF I AM FOUND GUILTY OF A SERIOUS INFRACTION OF CO-OP CAB RULES.

I SHALL REPAINT MY VEHICLE TO SOME OTHER COLOURS WITHIN TEN (10) DAYS AFTER LEAVING CO-OP CABS.

Signature

Approved By

33. Mr. Hadbavny told the Board that CO-OP has found its prohibition on the use of cellular phones to be impossible to enforce because the use of portables has become rampant. He also indicated that a copy of the dress code has not been attached to applications since about February of 1991, and that to the best of his recollection no one has ever been suspended or assessed an additional \$25.00 on dues for a dress code offence. Nevertheless, when he sees members wearing inappropriate clothing such as "short shorts", he tells them to "put on a long pair of pants or proper shorts", but keeps no record of such conversations.

34. Although CO-OP's members are under no obligation to use its dispatch system, it may reasonably be inferred that they (and their drivers) generally choose to do so most if not all of the time that they are in their cabs. Members and drivers of members' cars are bound by CO-OP's rules and policies, which are substantially similar to Diamond's in most respects. Those rules and policies are generally enforced by means of suspensions from the dispatch system or, in the case of late parcel deliveries, by denying payment of any fare. Most of the suspensions imposed by CO-OP are two hours long, but some continue for the balance of a shift or longer, when deemed appropriate by CO-OP. CO-OP has nine directors, some of whom drive cab and serve as CO-OP's inspectors for purposes of ensuring compliance with its rules and policies. CO-OP's computer system allows its members (and their drivers) who are booked into an area or post to reject up to three dispatched calls per shift, without losing their place in the dispatch queue. However, if they reject a fourth call offered by the dispatch system, they are automatically suspended from the system for the balance of the shift.

35. CO-OP has also had a serious problem with its members (and their drivers) using "cheat switches". When such a switch is discovered, the car is suspended from the dispatch system until the switch is removed. As was the case with Diamond, the use of cheat switches became so widespread that CO-OP found it necessary to incur the substantial cost of having anti-cheat switch devices (also known as "meter cheater defeaters") installed in the cars operating under its banner. When one of CO-OP'S members was found to have installed another switch in order to overcome the effect of the meter cheater defeater which had been installed in his cab at CO-OP's expense, he was not permitted to continue as a member of the brokerage.

36. CO-OP's computer system does not provide reports (such as those available to Diamond) from which the split between dispatched runs and flags can be determined. However, on the basis of the value of charges, the number of calls received by CO-OP, and his general knowledge of the Metro taxi industry, Mr. Hadbavny estimated the split to be 35%/65%. He initially estimated the average value of a charge account fare to be \$12, and suggested on the basis of his experience that flagged fares would average out to around the same amount. However, an exhibit entered later in his testimony indicated that the average value of CO-OP's charge account fares during the period from July of 1991 to January of 1992 was actually about \$16. Although no such data was available in respect of fares not charged to an account, Mr. Hadbavny maintained that the average cash street fare (and the average dispatched cash fare) would also be about \$16.00.

37. CO-OP has greater knowledge than Diamond of who drives the cabs which operate under its banner, since drivers must enter their personal identification numbers (which are their MLC driver's licence numbers minus one digit) in order to log onto CO-OP's dispatch system. This serves the security purpose of making it difficult for unauthorized persons to use the system. It also assists the company in following up on customer complaints and applying sanctions. In preparing a

list of employees for use by the Board in respect of the Union's certification application, CO-OP obtained some of the names from its computer system. It also obtained some names from the aforementioned insurance company's risk management department.

38. Evidence regarding Beck was adduced through its General Manager, Gail Souter. Since Beck maintains only a list of its members and does not maintain a list of drivers, it had to obtain the latter from its members in order to file a list with the Board in respect of the Union's application for certification. When asked during cross-examination if she has any confidence in the accuracy of that list, Ms. Souter replied that she has confidence in Beck's members who supplied her with the list. The evidence indicates that Metro Cab used a similar approach in preparing the list that was filed with the Board on its behalf. However, some of its members failed to respond to its request for drivers' names.

39. There are some minor differences between Beck's operations and those of CO-OP and Diamond. For example, Beck charges no deposit for its roof light, reduces its membership dues (of \$350.00) by fifty per cent for the first two months of membership, enters into an oral contract rather than a written contract with its members, and uses a two-way radio voice dispatch system (with vehicle radio identifier computer chips to automatically identify cab numbers from which radio transmissions are sent) to dispatch the 275 cabs (including 115 for which Ms. Souter's husband acts as designated agent) operating under its banner. However, such differences are immaterial for purposes of the issue before the Board in these proceedings.

40. The same is true of the differences in the operations of the other respondents about which evidence was adduced at this hearing, namely, Kingsboro (through its General Manager Larry Labovitch, who is one of its two co-owners), Metro Cab (through its General Manager Lorne Anisman, who is also one of its two co-owners), and Royal (through its President and General Manager, Mitch Grossman). For example, there is some variation in the monthly dues, which range from \$470.00 per month at Kingsboro to \$300.00 at Royal. Kingsboro encourages its members to paint their taxis green and white, but does not require them to do so because many of its members own plates and use them on better quality cars which they also use for personal transportation by removing the roof sign. Metro Cab, which has purchased a number of other cab companies over the years, including Yellow Cab, Art's Taxi, ABC Taxi, and others listed as respondents in File No. 0771-91-R, imposes a painting requirement only on cabs operating under the Metro Cab banner, and not on those operating under the "Yellow Cab" banner. Royal has a colour scheme which it requests members to adopt, but which is not mandatory. Most of the brokers other than Diamond do not have any contractual requirement that their members maintain insurance coverage, as such requirement is unnecessary in view of the insurance requirements specified in the By-law. Arrangements between brokers and their members tend to be somewhat less formal at the smaller brokers, such as Royal (with 88 members having a total of 186 cars) and Kingsboro (with 86 members having a total of 123 cars), but the relationship is substantially similar to that between the larger brokers and their members. Although penalties for specific infractions vary to some extent from brokerage to brokerage, all have formal or informal rules to protect their reputation and goodwill, foster good service to customers, and maintain the integrity of their dispatch systems. Brokers' unwritten, informal rules are based upon expectations that are well known within the industry, as all of the brokerage companies operate in much the same way. The aforementioned 70/30 split between flags and dispatched runs is applicable to all of the respondents about which evidence was adduced in these proceedings except Kingsboro, for which the split is 50/50.

41. It is clear from the totality of the evidence that corporate accounts are the backbone of each broker's business. They provide a solid and reliable revenue base for members and drivers,

and also provide income to the brokerage directly through service charges and indirectly through the membership fees which their revenues assist members in paying. Data pertaining to Metro Cab provides an example of the substantial sums derived from corporate accounts. Its corporate account charges average \$550,000 per month, which amounts to about \$1000 a month for each of the cabs it dispatches. Royal's corporate charges average around \$260,000 per month, which amounts to almost \$1400 for each of the cabs it dispatches. Statistics produced by Diamond indicate that during the period from May to September of 1991, charge coupons that it processed averaged about \$700,000 in total value per month, which amounts to about \$1,150 per cab operating under its banner.

42. From his experience as a driver prior to and after becoming General Manager of Kingsboro, Mr. Labovitch testified that both dispatched fares and flags run the gamut from very short runs to very long runs, and that it cannot legitimately be said that one is more lucrative than the other. Evidence adduced by the Union provides some support for Mr. Labovitch's first assertion, but demonstrates that his second assertion is incorrect. In addition to Nick Vecchiarelli, whose evidence will be referred to later in this decision, the Union called five witnesses in these proceedings: David Gentles, who leases a plate for \$810 per month and uses it on his own vehicle operating under Metro Cab's "Yellow Cab" banner; Barry Wilson, who pays \$350 a week to a lessee for a six night package that includes a plate, a car operating under the CO-OP banner, insurance and all other expenses except gasoline; Jack Hardwick, who generally pays \$70 a day (plus the cost of gasoline) to drive the day shift (5:00 a.m. to 4:00 p.m.) from Monday to Friday in a cab owned by a member of Diamond (who occasionally accepts a 50/50 split on a slow shift instead of insisting upon payment of the full \$70); Vijay Prakash, who pays around \$600 a week to a designated agent to drive under the Diamond banner through a weekly deal under which the agent provides the plate and an insured cab, the maintenance and fuel costs of which are the responsibility of Mr. Prakash (who generally works nights) and his day-shift partner; and Brian Denning, who intermittently drives under the Beck banner by paying \$55 a day (plus the cost of fuel) for a shift. Trip sheets (for the period from August 20, 1991 to February 12, 1992) prepared by Fatai Quadri, who drives under the CO-OP banner, were entered as an exhibit on the agreement of counsel without the necessity of having him called as a witness.

43. The aforementioned individuals provided the Union with trip sheets covering various periods of time and containing a variety of information about their fares such as when and where they began and ended, the amount of each fare, and whether it was paid by cash or chit. Although the By-law requires all drivers to fill out trip sheets, it appears from the evidence that many do not do so on a regular basis unless they have a probationary owner's licence or are driving for a person with such a licence. Thus, with the exception of those submitted by Mr. Prakash who provided the Union with some trip sheets that he had prepared prior to becoming aware that the Union was interested in obtaining trip sheets, most of the trip sheets entered as exhibits were prepared at the request of the Union for use in these proceedings. Data from those sheets was entered into a computer and then summarized in a variety of categories by Michael Blazer, who ably assisted Mr. Hayes in presenting the Union's case in these proceedings. A total of 2233 trips, yielding fares totalling \$31,627 were entered into the database. Thus, the average fare derived from that data was \$14.16. The average dispatched fare of \$16.41 was \$5.26 greater than the average flagged fare of \$11.15. The average fare paid by chit was \$19.90, while the average cash fare was \$8.94. The corresponding figures for subsets of data pertaining to individual brokers came out as follows:

	<u>Diamond</u>	<u>CO-OP</u>	<u>Metro Cab</u>	<u>Beck</u>
Total # of trips	687	197	1234	115
Total fares	\$9,145	\$2,342	\$19,176	\$963
Average fare	\$13.31	\$11.89	\$15.54	\$ 8.37
Average dispatched fare	\$16.81	\$17.00	\$16.62	\$10.67
Average flagged fare	\$12.14	\$ 9.54	\$11.16	\$ 6.41
Average fare paid by chit	\$19.85	\$19.59	\$19.95	not available
Average cash fare	\$ 7.21	\$ 9.45	\$ 9.92	not available

The data also suggests that chits were used to pay for about three-fifths of the dispatched runs, and that those chits represented about 70% of total revenues derived from dispatched runs. It further suggests that chits were used to pay for about 30% of all flags, and that those chits represented about 50% of total revenues derived from flags. (A small minority of those chits would pertain to another broker's corporate accounts, as the evidence indicates that drivers occasionally accept such chits and then sell or trade them to a member of the other broker, or use them to purchase fuel.)

44. Those figures are, of course, only as accurate as the data from which they were derived. In this regard, we would note that some of that data appears to be quite reliable. Mr. Gentles, for example, impressed us as a highly credible witness who, having filled out trip sheets most of the time for the past ten years, provided the Union with 67 trip sheets regarding his activities during the spring and summer of 1991. Although the number of flagged fares that he obtained was reduced by his reluctance to "play the street" based upon personal safety considerations, that factor does not affect the average of the more than 200 recorded fares which he did obtain in that manner. We also found Mr. Wilson to be a reliable witness. However, he submitted only thirteen trip sheets (for February 3-7, 10-13, and 25-28, inclusive). When asked (during cross-examination) why there were no trip sheets for the period between February 13 and 25, he replied, "I was probably just lazy [and] didn't fill out run sheets for that period." Mr. Hardwick submitted trip sheets for about half of the working days between November of 1991 and June of 1992. His explanation of what happened in respect of the other days on which he worked during that period was that "there may be sheets that [he] forgot to put in", and that he might not have made out trip sheets for each of the days. He also acknowledged that he might have forgotten to record some fares on the days that he did fill out trip sheets. Mr. Hardwick was unable to explain why the average cash fare from the trip sheets submitted in respect of CO-OP and Metro Cab was 35% higher than his average cash fare (of \$7.16). Mr. Gupta's average cash fare of \$7.59 was also substantially lower than the average cash fare from the CO-OP and Metro Cab trip sheets. His explanation for that discrepancy was that he "usually plays the downtown area ... because there are lots of Diamond charges down there". Mr. Hardwick's two corporate account lockups have resulted in the data from his trip sheets being substantially skewed in comparison with Diamond's dispatch system data, which takes into account all of the cabs operating under Diamond's banner and indicates that chits are used to pay for only about 15% of all trips. The only trip sheets submitted in respect of Beck were those prepared by Mr. Denning in the seven day period from May 26 to June 1, 1992. They are of very limited value not only because of the relatively short time period covered, but also because they do not include dispatched parcel runs where customers filled in pre-set flat rates, "high flagged" flat rate fares to the airport or other locations outside Metro, and minimum charge parcels in the downtown core.

45. Although the reliability of some of the Union's data is problematic for the reasons described above, we are satisfied from the data which we have found to be reliable that the average dispatched fare is appreciably larger than the average flagged fare. We are also satisfied that the average fare paid by chit is considerably larger than the average cash fare. Thus, having regard to all of the evidence, including that pertaining to "cheat switches", "high flagging", and "manual

dispatching", we have concluded that the persons whose status is in issue in these proceedings derive a substantial proportion of their income on a regular basis from a combination of fares dispatched by the broker under whose banner they drive and flagged fares paid by means of that broker's corporate account chits.

46. Mr. Hadbavny, the aforementioned General Manager of CO-OP, worked as an independent for eight and a half years between 1957 and 1966, using his own plate and car. During that time he "cruised the streets and stayed on the independent cab stands" (at Union Station, the Royal York Hotel, etc.), earning enough money to have a house and raise a small family. Nick Vecchiarelli, whose experience as an independent is far more recent, painted a much bleaker economic picture. He described the typical independent as a person owning a plate and a car, who after many years in the industry is "more interested in relaxing and having some peace of mind than running here and there trying to make a pile of money." Having driven cab on a part-time basis from 1965 to 1975 for ABC Taxi (which is currently part of Metro Cab), and on a full-time basis for Diamond from 1975 to 1986, Mr. Vecchiarelli began to work as an independent in 1986 after his name came up on the MLC drivers' list, enabling him to obtain a plate for about \$3,500.00. After purchasing a vehicle on which to use that plate, he chose to work as an independent rather than through a broker because he was of the opinion that in view of his declining health, he would not last another five years working at the more hectic pace necessary to cover brokerage fees in addition to all of the other expenses involved in owning and operating a cab. (As noted in the above-quoted overview, a licence issued when a driver reaches the top of the drivers' list is probationary and cannot be sold for five years, during which the plate owner must maintain a good record, drive on a full-time basis the taxi to which the plate is affixed, and continue to file copies of his income tax with the MLC.)

47. Approximately three-quarters of Mr. Vecchiarelli's time in his independent cab was spent waiting for fares. Much of the remaining time was devoted to short trips, such as fares from Union Station or the King Edward hotel to the Convention Centre. While driving as an independent, Mr. Vecchiarelli did not accept credit cards because he was unwilling to permit a credit card company to retain a percentage of the fare. He occasionally permitted passengers to use Diamond chits to pay their fares, and then used them to purchase gas or gave them to his son-in-law, Jack Hardwick (who, as noted above, drives the day shift in a cab owned by a member of Diamond). Mr. Hardwick tried driving Mr. Vecchiarelli's cab during the day for a period of about two weeks (with Mr. Vecchiarelli driving it at night) but found it necessary to return to driving the Diamond member's cab because he was unable to earn a living driving Mr. Vecchiarelli's independent cab. Mr. Hardwick attributed his lack of success as a driver of an independent cab to the absence of dispatch services and the inability of the driver of an independent cab to utilize the aforementioned posts reserved for the exclusive use of owners of independent cabs.

48. A summary of the trip sheets which Mr. Vecchiarelli kept from January 7 to October 28, 1991 (when he sold his plate for \$73,000) indicates that his 2,548 fares during the 155 days he drove in that period totalled \$11,501 (exclusive of tips), for an average of \$74.20 per day or \$4.51 per trip, to which he added 10% in respect of tips for income tax purposes. His income statements from the three previous years indicate that his total annual income (including his gross revenues, 10% gratuities, and gas rebates) averaged about \$20,000 which, after deduction of expenses, generally left him with net income of about \$10,000. Although we are not prepared to give very much weight to those trip sheets and income statements as we are not persuaded that they are entirely accurate and complete, we do accept the thrust of Mr. Vecchiarelli's evidence that working as an independent is generally less profitable than driving a cab associated with a brokerage, and that it is generally not a viable option for cab drivers in Metro other than seasoned veterans owning their own cabs and plates. The validity of that conclusion is confirmed by the fact that only about 600 of

the 3500 cabs in Metro operate as independents. The evidence also indicates that independents work primarily in the downtown core and at the large shopping malls where there is a relatively high volume of street traffic, an approach which obviously could not be adopted with economic success by all or even most of the cabs in Metro as there would not be sufficient business in those locations to provide a liveable income for all of them.

49. Section 1(1) of the *Labour Relations Act* provides, in part, as follows:

1.-(1) In this Act,

• • •

“dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

“employee” includes a dependent contractor;

• • • •

Section 6(5) of the Act provides:

A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of the dependent contractors wish to be included in such bargaining unit.

50. In *Hamilton Yellow Cab Company Limited*, [1987] OLRB Rep. Nov. 1373 (reconsideration request dismissed, [1989] OLRB Rep. Feb. 144; application for judicial review dismissed by Div. Ct., [1990] OLRB Rep. Nov. 1199), the Board described the history, scope, and purpose of those provisions as follows:

39. In 1965 Professor Arthurs introduced the term “dependent contractor” into Ontario’s legal lexicon. He used that term to describe individuals whose economic situation resembles that of an independent entrepreneur in some respects, but, when viewed in its totality, really more closely resembles that of an employee. (See: H. W. Arthurs: *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power* (1965), 16 University of Toronto Law Journal 89). In Professor Arthurs’ opinion, “self-employed truck drivers, peddlers, and taxicab operators, farmers, fishermen and service station lessees personify the dependent contractor”. He argued that these individuals should be entitled to engage in collective bargaining. In 1975 the Legislature accepted that proposition and enacted what is now section 1(1)(h) of the *Labour Relations Act*.

40. In *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. April 197, the Board discussed the background and purpose of the then recent amendment in a long passage to which we might usefully refer:

17. This case requires us to explore the outer limits of the *Labour Relations Act*. The purpose of this statute, as set out in its preamble, is to “further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees”. The Act itself provides a structure for the organization of individual workers into combinations. Collective action by workers, once regarded as amounting to an illegal conspiracy, has been legitimized, the underlying rationale being the need to protect the individual employee from the worst extremes of the

labour market. The countervailing power of collective bargaining can now be used by workers to obtain improved wages, hours of work, and other working conditions.

18. The *Labour Relations Act*, however, was never intended to insulate entrepreneurs from economic competition by allowing that class of person to act in combination. Such combinations not only fall outside the purview of collective bargaining legislation, but they are also expressly restricted by the federal *Combines Investigation Act*. Collective bargaining policy, thus, expressly encourages combinations, while competition policy operates in the opposite direction. Given these two quite different policies, it then becomes important to identify the outer limits of our own statute, the *Labour Relations Act*.

19. The task of distinguishing between the individual worker and the true entrepreneur has never been easy. There exists an economic spectrum - coloured at one end by the true entrepreneur and at the other end by the individual worker. These two points of the spectrum can be identified clearly. The businessman who sells goods, and employs others to produce these goods, is clearly not entitled to use the *Labour Relations Act* for the purpose of forming a combination with other businessmen. On the other hand, it is clear that the worker who supplies only his own labour to an employer is entitled to organize with other workers under the Act. At the shaded area toward the middle of the economic spectrum, however, it becomes difficult to draw a distinction.

20. The problem of drawing a distinction in this area is not a new one for this Board. The case of *Livingston Transportation Ltd.*, [1972] OLRB Rep. May 488 provides a good example of the difficulties faced by the Board when determining the outer limits of the Act. The question before the Board was whether certain truck owners were employees or independent contractors. In answering that question, the Board alluded to no less than four approaches that might be taken:

- 1) resort to the control test used for determining the vicarious liability of an employer;
- 2) use of the four-fold test adopted by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.*, et al [1947] 1 D.L.R. 101, a case concerning liability for municipal taxation;
- 3) simply asking the question of whose business is it;
- 4) application of what was referred to as "the statutory purpose test".

The multiplicity of approaches that emerged in the *Livingston* case is some evidence of the problems that then faced the Board when identifying the outer limits of the Act. Fortunately, there is now a new point of departure for distinguishing between the individual worker and the true entrepreneur.

21. The *Labour Relations Act*, having been amended in 1975, now provides a single, and less confusing, approach to the problem. Section 1 of the Act has been amended to provide that the term "employee" includes a "dependent contractor". That same section defines dependent contractor as "a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of independent contractor". Section 6 of the Act, moreover, has been amended to provide that "[a] bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit".

22. We do not construe the inclusion of these provisions in the Act as merely amounting to a legislative attempt to codify the Board's existing jurisprudence, such as *Livingston Transportation*. In those cases, the question had to be framed in terms of whether a person was an employee or an independent contractor. The Board, as a result, placed emphasis on the fourfold test as set out in *Montreal Locomotive Works*. The appropriateness of this test for determining the outer limits of a collective bargaining statute was always questionable. This concern has been best put by Dean Arthurs in his perceptive article. "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965), U.T.L.J. 89. At page 94, he comments:

Whether the "control" or the "fourfold" test is the more appropriate for identifying the "master-servant" relationship is not here material: The pertinent question is whether the factors in an employment relationship which invoke vicarious liability bear any relation to those which invite a regime of collective bargaining. The very terminology - "master" and "servant" - evokes a nostalgic Victorian image of authoritarianism which is collective bargaining's antithesis. More important, any rationale of vicarious liability focuses ultimately on the allocation of loss as between employer and injured third party, and not on the rights and duties of employers and employees, *inter se*. The control test and its modern successor, the fourfold test, are thus intended to identify those features of the employment relationship which will permit the employer to escape liability if he falls outside the rationale of vicarious liability. Control may be important if vicarious liability is based on a desire to discourage negligent work practices; use of the employer's tools or financial independence upon him may be important if vicarious liability is based on a desire to reach the employer's "deep-pocket," or on a "loss-spreading" rationale. But the relevance of any of these considerations to situations where no third party is present is purely fortuitous. The rationale of labour relations legislation is that the public interest is best served by the promotion of collective bargaining between employers and their employees. Surely any meaningful definition must be formulated in the light of this statutory purpose. Indeed, the Ontario Board in the *Telegram* case recognized this fact: "[T]he elements to be considered are not alone those that were established for the purpose of determining whether an employer is vicariously responsible for the tortious acts of his servants, but those as well that have a bearing on the labour relations aspects of the relationship. ..." Yet the *Montreal Locomotive* test was adopted by the Ontario board in the *Telegram* case, and has been followed ever since.

23. The question that must now be answered by the Board is, not whether a person falling within the shaded area on the economic spectrum is an employee or an independent contractor, but whether that person is a dependent contractor. This new point of departure does not mean that considerations formerly taken into account are now totally irrelevant. The statutory definition of dependent contractor clearly requires some reference to the employee-independent contractor distinction. A shift of emphasis has occurred, however, as this new definition recognizes that persons in an economic position closely analogous to that of the employee should also enjoy the benefits of collective bargaining. The determination of who is a dependent contractor is now a comparative exercise that requires reference to a much broader range of labour relations considerations.

24. This redefinition of the limits of the *Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship. These two considerations provide the justification for the shift of emphasis.

25. The shift of emphasis is readily apparent from a reading of the definition of

dependent contractor. Clearly a person need not be employed under a contract of employment to be considered as a dependent contractor, and provision of tools, vehicles, equipment, machinery is no longer a major consideration. Contractual form and the ownership of tools are no longer essential considerations. The emphasis, instead, is placed upon economic and business factors. Both the type of economic dependence that exists, and the kind of business relationship entered into, determine whether a person more closely resembles an employee than an independent contractor.

26. Economic dependence must be such that it puts the person in roughly the same economic position as an employee who must face the perils of the labour market. Mere economic vulnerability, however, is not a sufficient basis for a finding that a person is a dependent contractor, since this is a condition that may be experienced by the true entrepreneur, just as much as the individual worker. There must exist, therefore, a type of economic dependence closely analogous to that of the individual worker.

27. This first requirement of a particular type of economic dependence is closely related to the second requirement of a particular kind of business relationship. In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be "under an obligation to perform duties for that person" roughly analogous to that of an employee. This reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee. Such an examination, however, need not result in the identification of a particular contractual obligation, since a business relationship may exist, and continue, in the absence of any particular contractual obligation. The Board, therefore, need not confine itself to this very narrow issue but may deal with the wider issue of the nature of the business relationship.

41. For collective bargaining purposes the Legislature has abandoned the traditional common law distinctions between "employees" and "independent contractors". Rather, the Act now identifies a hybrid creature - the dependent contractor - whose rights depend upon the statutory definition, labour relations considerations, and the extent to which s/he is in an economic position roughly equivalent to those for whom this collective bargaining statute was designed. The form of the relationship or the possession of particular assets (for example the ownership of vehicles) are no longer determinative of an individual's status. The test is whether the individual or group are more like employees than self-employed independent entrepreneurs. If they are, they are entitled to bargain collectively. It remains a question of just where to draw the line.

51. The Board has also been called upon to interpret the Act's dependent contractor provisions in the context of the taxi (and airline limousine) industry in a number of other cases. See, for example, *Airline Limousine*, [1988] OLRB Rep. March 225; *Windsor Airline Limousine Services*, [1981] OLRB Rep. March 398; *Niagara Veteran Taxi*, [1981] OLRB Rep. Feb. 198, and [1980] OLRB Rep. March 337; and *Blue Line Taxi Co. Limited*; [1979] OLRB Rep. Nov. 1056. With the exception of *Niagara Veteran Taxi* (which will be dealt with later in this decision), all of those cases pertain to taxi drivers who derived between 95 and 100% of their income from fares obtained through the dispatch broker upon which they were found to be dependent. In *Seven-Eleven Taxi Ltd.*, [1976] OLRB Rep. April 134, which was a case of first impression, the Board found Mississauga taxi drivers operating under that respondent's banner to be independent contractors even though their street pickups were minimal and the biggest percentage of their business came through the brokerage. However, the approach adopted in that decision has been superseded by the Board's subsequent decisions construing the Act's "dependent contractor" definition in the context of the taxi industry.

52. The Board has also been called upon to interpret the Act's dependent contractor provisions in the context of truck owner/operators. An example of such a case is *Craftwood Construction Co. Ltd./Coreydale Contracting Co.*, [1980] OLRB Rep. Nov. 1613, in which the Board

wrote, in part, as follows in considering the possibility of owner/operators being economically dependent on more than one person:

15. From the transcript relating to Coreydale, Fedele earned 1.4% of his income; Romano earned 1.6% of his income; and Quaranta earned 3.1% of his income from this company. From Craftwood, Di Savino earned 5% of his income; Polsinelli earned 5.5% of his income; and Facchini earned 15% of his income. The most recent case dealing with economic dependence is *A. Cupido Haulage Limited*, [1980] OLRB Rep. May 679. ... the panel at page 688 in this case outlined its understanding of the general approach that has been adopted in the vast majority of cases in the following way:

In deciding whether owner/operators who do not employ others on a regular ongoing basis more closely resemble independent contractors or employees, the Board has looked to the source of work. If the owner/operator looks to the quarry for the bulk of his work and does not advertise or otherwise solicit customers on his own, and is generally available during the working hours of the quarry, he is acting more like an employee truck driver than an independent contractor. The Board looks to the percentage of income derived from the relationship under inquiry. If the owner/operator derives a substantial portion of his income from the quarry (the amount ranged from 80% to 100% in the reported cases) he is in a position of economic dependence more like an employee than an independent contractor.

From all of the above, can it be said that the owner/drivers who are the subject of these certification applications are in a position of 'economic dependence' on either Coreydale or Craftwood as that term is employed in the Ontario *Labour Relations Act*?

16. We believe this question must be answered in the negative. Section 1(1)(ga) makes it clear that the issue of economic dependence is in relation to the person for whom the work is done. From the wording used, it is not readily apparent that the Legislature had in mind an "economic dependence" on a vast number of purchasers or on an entire industry. Rather, the words more reasonably reinforce the existing approach of this Board which has measured economic dependence by the degree of economic association with a particular purchaser of the service or work in question. Indeed, it is almost a tautology to speak in terms of dependence on an industry in the sense that almost everyone is dependent on the source of their income when the source is so widely defined. This is not to say, however, that it is impossible to be economically dependent on more than one person and thereby more resembling an employee in relation to each of the purchasers of the services in question. However, the number of such purchasers would have to be very limited and they would have to exercise a *de facto* control, over the labour market - an oligopoly in economic terms if you will. The economic relationship with each person would, as well, have to be substantial and more or less regular. On the evidence before us, all of these conditions are absent. The owner/operators subject to these two applications have provided their services to a great variety of purchasers. Some of these purchasers are subject to collective bargaining (although all are not party to the same collective bargaining arrangements); all are not active in the same sectors; and all do not deal with the same trade unions. Others, of course, are unorganized. Indeed, these latter contractors may be in the majority when the two cases are looked at in their totality and against the two collective agreements filed by the intervener. Finally, the economic relationships in all cases are not substantial. For all of these reasons, it is not possible to say that the owner/operators in these two cases are in a position of economic dependence upon either of the two respondent companies.

53. As indicated in that case, a contractor must derive a substantial portion of his or her income from a respondent to warrant a finding of economic dependence upon that respondent. Although that decision refers to cases in which that portion ranged from 80 to 100%, it does not state that a finding of economic dependence cannot be made outside that range. Indeed, by suggesting that it is possible for a dependent contractor to be economically dependent upon more than one person, it implicitly suggests that the percentage applicable to each could be considerably lower.

54. For other decisions interpreting "dependent contractor" in the context of truckers, see

Atway Transport, [1989] OLRB Rep. June 540; *The Citizen*, [1985] OLRB Rep. June 819; *A. Cupido Haulage*, [1980] OLRB Rep. May 679; and *Superior Sand, Gravel & Supplies Ltd.*, [1978] OLRB Rep. Feb. 119.) For examples of the application of the Act's dependent contractor provisions in other contexts, see *Ontario Hydro (Bancroft Area)*, [1986] OLRB Rep. June 790 (tree removers), and *Algonquin Tavern*, [1981] OLRB Rep. Aug. 1057 (burlesque dancers).

55. Of the Board's previous decisions involving the taxi industry, the one most similar to the instant case is *Hamilton Yellow Cab*, *supra*. (For ease of reference, the respondent broker in that case will be referred to as "Yellow" in this decision.) Apart from the Hamilton requirement that each applicant for a taxi driver's licence have the approval of a cab owner and the broker under whose banner the cab operates, the Hamilton By-law is quite similar to the Metro By-law. (After obtaining a taxi driver's licence, a driver is eligible to drive any taxicab in the City of Hamilton, and has no obligation to drive for the approving owner or broker.) There is a similarly complex matrix of economic relationships among owners, lessees, and operators. In both municipalities, the vast majority of cabs are associated with brokers that provide access to dispatch services and substantial revenues from corporate accounts, in return for periodic fees. In neither locale do brokers make payments or deductions in respect of Unemployment Insurance, Canada Pension Plan, Workers' Compensation, or income tax. Brokers in both locations exercise substantial control over drivers through their ability to grant or withhold dispatched runs, and through their ability to grant or deny continued membership in the brokerage, with its concomitant access to corporate accounts. However, there are also some differences between the situation in Metro and the situation in Hamilton. For example, unlike its Toronto counterparts, Yellow regulates the size, styling, and age of the cars it permits to operate under its banner. It also exercises greater initial control over whom it will permit to drive under its banner, and has on occasion required drivers to pass proficiency tests. There is more evidence of what might be characterized as minor entrepreneurial activity by drivers in Metro through highflagging, acceptance of credit cards, acceptance of other brokers' corporate chits, and use of cellular phones which enable customers to contact drivers directly without having to go through the dispatch system. However, the most notable difference is that Yellow generated and allocated through its dispatch system at least 80% of the business of the cabs operating under its banner (because, until shortly before the hearing of that certification application, drivers were not permitted to pick up customers who flagged them on the street).

56. A comparison between the facts of that case and the facts of the instant case indicates that the drivers in Hamilton were more highly dependent upon Yellow than their Metro counterparts are upon their respective brokers. Thus, the latter fall closer to the line between dependent contractors and independent contractors. Nevertheless, we are satisfied on the totality of the evidence that the persons whose status is in issue in the instant case are also "dependent contractors" within the meaning of section 1(1) of the Act. As indicated above, they derive a substantial portion of their income on a regular basis from a combination of fares dispatched by the broker under whose banner they drive and flagged fares paid by means of that broker's corporate account chits. Although the cash portion of those fares does not flow directly from the broker, that situation is quite normal in the context of the taxi industry and is of no real significance; see, for example, *Niagara Veteran Taxi*, *supra*, and *Blue Line Taxi Co. Limited*, *supra*. What is significant is that they regularly and consistently derive a substantial portion of their income from a single entity which exercises detailed control over the performance of their work by means of an elaborate system of written or unwritten rules and disciplinary responses which effectively penalize anyone failing to meet its standards (which must be maintained if the broker is to preserve its goodwill by ensuring that those who call it for transportation are properly served). Although drivers suspended from the dispatch system can continue to "play the street" with a view to obtaining flag fares, as noted above this is generally far less remunerative than servicing dispatched calls in combination

with “playing the street”. Thus, even a brief suspension gets the driver’s attention and generally dissuades the driver from continuing to violate a broker’s rule or policy by depriving him or her of opportunities to earn money. Such suspensions are analogous to suspensions imposed on errant employees by their employers in other employment contexts, and similarly carry with them the risk that the entire relationship may be terminated if the wrongdoer proves to be incorrigible or engages in egregious misconduct. Thus, the evidence clearly demonstrates that brokers play a significant role in the Metro Taxi industry’s “web of control”, which also includes the MLC and its staff, designated agents, and multi-plate owners or lessees.

57. Although drivers are at liberty to reject dispatched runs and to work when and where they wish, economic pressures substantially limit the exercise of those freedoms. Moreover, if a sufficient number of drivers exercised those freedoms in such manner as to leave their broker unable to provide proper service to customers, the broker would undoubtedly put into effect whatever additional rules and policies were needed to restore proper service and safeguard the broker’s goodwill. Although the persons affected by this application are also at liberty to change brokers, and sometimes do so, this merely shifts their dependency from one broker to another, and is analogous to the situation of any employee who leaves the employ of one employer and becomes an employee of another. Thus, having regard to the totality of the evidence, we are satisfied that the persons whose status is in issue in these proceedings are not only in a position of economic dependence upon the broker under whose banner they drive, but are also under an obligation to perform duties for that broker, such that their relationship with the broker more closely resembles the relationship of an employee than that of an independent contractor. In the instant case, as in *Hamilton Yellow Cab, supra*, if one asks the question “whose business is it”, the answer is clear. The drivers are not carrying on an independent business on their own behalf; they are an integral part of the broker’s operating organization, subject to substantial control by the broker who imposes discipline not only for improper conduct in respect of dispatched trips but also for improper conduct in respect of flags (where, for example, a passenger who has flagged a cab operating under the broker’s banner calls the broker to complain about matters such as the driver’s conduct or the condition of the cab).

58. The level of dependency in the instant case is somewhat similar to that which existed in *Niagara Veteran Taxi, supra*, for owner/operators who regularly worked the tourist area of Niagara Falls and, because of the availability of flagged fares from tourists during the summer months, derived only about half of their business from the dispatching broker during that period. (In that case, the membership dues were somewhat lower than those charged by most Toronto brokers, but there was an additional initiation fee of about \$500.00.) In concluding that those drivers were economically dependent on the broker, the Board wrote, in part, as follows in paragraph 27:

.... While some owner-operators who regularly work the tourist area of Niagara Falls are less dependent on Niagara Veteran Taxi during the summer months than others, the Board is fully satisfied that even they on a year-round basis are economically dependent on the dispatch service for their livelihood. The fact that owner-operators are willing to pay \$51.50 on a weekly basis in both the summer and the winter for the dispatch and other services and the fact that they originally purchased their relationship with N.V.T. with a payment of approximately \$500.00 underscores the Board’s conclusion that the owner-operators are dependent on N.V.T. for their economic well-being.

59. The same is true of the brokers’ members in the instant case who are willing to pay between \$289 and \$470 per month for the dispatch and other services they provide. Their dependency on brokers is also underscored by the fact that only a small minority of cab owners in Metro operate as independents, unassociated with a broker. Although a driver who leases a broker dispatched cab by the shift, day, or week is usually not a member of the brokerage and, accordingly, does not generally make such payments directly to the broker, s/he effectively pays a proportional

share of them in the form of rental payments. Moreover, anyone who drives the cab is subject to the broker's control through the means described above.

60. Thus, for the foregoing reasons, we have concluded that the persons whose status is in issue in these proceedings are dependent contractors within the meaning of section 1(1) of the Act, as they are persons who perform work or services for another person (namely, the broker under whose banner they operate) for compensation and reward on such terms and conditions that they are in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor. In concluding that the persons whose status is in dispute in these proceedings are employees of the respondent under whose banner they drive, we express no opinion as to whether any of them are also employees of someone else. That is a matter for determination under section 1(4) of the Act, the applicability of which is not in issue in this phase of these proceedings.

61. Near the conclusion of his argument, Mr. Hayes (who had given the other parties and the Board advance written notice of his intention to do so) made submissions concerning the procedure to be applied to determine the number of employees in each of the bargaining units at the time of the applications for purposes of the count. It was his primary contention that in view of the respondents' lack of confidence in the accuracy of their lists, exemplified by Mr. Bell's testimony that he has no real confidence in the accuracy of the list that was filed with the Board on behalf of Diamond, the Board should disregard all of the respondents' lists and rely upon the information provided by the Union (in its Form 9 declarations) concerning the number of persons who were employed in each of the bargaining units at the pertinent time. Alternatively, he requested the Board to exercise its power under section 105(2)(h) of the Act to authorize a Vice-Chair to inquire into the matter and report to the Board thereon.

62. Although we share the Union's concern regarding the undesirability of having the disposition of these applications delayed by protracted proceedings regarding the numerous challenges which the Union has raised in respect of those lists, we are not persuaded that it would be appropriate to simply disregard those lists, as suggested by Union counsel. Although the manner in which those lists were (of necessity) compiled (as described in paragraphs 29, 37, and 38 of this decision) makes it likely that they are not completely accurate, it does not indicate that they are of no validity whatsoever. Moreover, there is nothing before the Board to suggest that the information available to the Union would likely be substantially more accurate than that available to the respondents. We are also not persuaded at this juncture that the appointment of a Vice-Chair under section 105(2)(h) would result in the list issues being resolved more expeditiously than if the Board were to follow its usual practice of appointing a Board Officer pursuant to section 105(2)(g). Accordingly, a Board Officer, to be designated by the Board's Manager of Field Services, is hereby appointed to confer with the parties and report to the Board on the respondents' lists and the composition of the bargaining units.

63. We also find it appropriate in the circumstances of this case to direct the parties to meet with the aforementioned Pre-Hearing Vice-Chair (Alternate Chair R. O. MacDowell), on a date to be determined by him, to attempt to narrow the issues and agree upon procedures whereby those remaining in dispute can be resolved expeditiously, without unduly taxing the resources of the parties and the Board.

DECISION OF BOARD MEMBER W.A. CORRELL; November 16, 1992

1. I am able to agree with my colleagues that the respondent dispatch services in these cases provide members and drivers with an organized opportunity to locate and service customers

with greater efficiency. This organization and dispatching of information also provides a substantial financial basis for owners who are thus willing to pay a fee for the service and attract drivers to rent or lease their vehicles.

2. The degree to which that basis is sufficient to be identified as “financial dependence” for the purpose of defining an independent contractor in the circumstances of these applications is vague. Other cases have established that dependence as 70% to 80% of total income i.e. Hamilton Yellow Cabs, Niagara Veterans Cabs, and others. Regardless of the percentages of total income these Metro Toronto cases are distinguishable from those previous awards because of the degree of control and management activity exercised by the brokers in Yellow Cabs and the other cases. The precise number to define dependence is not possible to identify since the percentages will vary from day to day and month to month. In addition the significance of that number to an individual owner or driver will vary in accordance with individual financial circumstances and needs. The lack of concrete evidence presented to the Board makes a decision solely based on these numerical criteria very subjective and of doubtful value here and for future cases.

3. The definition of dependent contractor however has two components, financial dependence *and* an obligation to perform work. The second part of the definition in this case needs careful consideration. The obligation to perform work means in my opinion the acceptance of the driver or owner of that obligation and also the acceptance by the broker of that other person to fulfill the obligation. That obligation may exist between the dispatching service and the owner of the taxi as a member of the dispatch company but does not exist in any direct sense between the driver of the taxi who leases it from a licensed owner (under various arrangements) and the dispatching company.

4. In the case of the owner member of the dispatching firm that acceptance comes about when the deal is made about the payment of monthly fees. But no such agreement comes about between the dispatching company and the driver who rents a licensed taxi on a regular basis or who pays a one-time fee on an occasional basis for the licensed taxi.

5. Implicit in the agreement between any two parties about the obligation to perform work are the criteria of the performance of the obligation. This includes the terms and conditions of work which would be determined by the employer or agreed to by collective bargaining.

6. This lack of obligation between the driver who does not pay a fee directly to the dispatch firm becomes clearer when one considers the detail of the relationship in a collective bargaining arrangement.

7. Parties, other than the respondent broker, will have a very significant influence over the working relationship with the driver who leases the taxi. For instance:

- The MLC will determine the fares, the driver training and driver competence.

- The taxi owner will work out with the driver matters concerning hours of work, starting and quitting times, days off, rental fees, the application of seniority in such things as staff reductions or better shifts.

For these reasons the driver who does not own a cab, has a much closer “obligation” relationship with these two parties than he has with the respondent brokers.

8. The award of my colleagues quotes from a Dean Arthur study beginning on page 63 of

this award. It is obvious from this study of the definition of dependent contractor that this case could lead us one step further along the described spectrum. In my opinion the Board should now be wary of how far we are prepared to go. Page 66 of this award states at quoted paragraph 26:

“26. Economic dependence must be such that it puts the person in roughly the same economic position as an employee who must face the perils of the labour market. Mere economic vulnerability, however, is not a sufficient basis for a finding that a person is a dependent contractor, since this is a condition that may be experienced by the true entrepreneur, just as much as the individual worker. There must exist, therefore, a type of economic dependence closely analogous to that of the individual worker”.

9. To follow along with this thinking we must consider the evidence that the respondent broker does not contribute on the drivers behalf to U.I.C., C.P.P., or W.C.B. protective benefits. This is not the kind of treatment to be expected in “... a type of economic dependence closely analogous to that of the individual worker”.

10. Nor is it roughly analogous in other matters to a business relationship of employer and employee between the respondent brokers and those drivers who are not taxi owners. For instance: The non-owner driver does not pay fees for dispatch services which are related to “an obligation” to the broker, does not have statutory deductions made from his earnings for income tax, U.I.C., C.P.P., has no protection provided by the broker for Worker Compensation or other protection from infringements of the *Employment Standards Act* or Health and Safety regulations. In these matters he is on his own.

11. The Board should be concerned in this award (although not specifically charged by the parties to consider the matter in this case) about the implications of providing Collective Bargaining privileges between non-owner drivers and the respondent broker. In light of what has been noted above one might ask what will these parties have left to bargain about? Certainly it will be very little in terms of what the *Labour Relations Act* has contemplated.

12. A serious question to be answered in this case is not only “... whose business is it ...” but more specifically who is the employer, and who has an obligation to whom.

13. For these reasons I would not agree that the definition of dependent contractor should be developed further than it is and I would reject the applications.

1553-92-R Independent Paperworkers of Canada, Applicant v. Domtar Inc., Respondent

Certification - Parties - Practice and Procedure - Following termination of CPU’s bargaining rights, rival union making certification application - CPU not receiving notice of application from Board - Board determining that CPU not entitled to notice and not establishing that it represents any employee in the bargaining unit - Board dismissing CPU’s application to intervene or participate in certification application

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members W. A. Correll and B. L. Armstrong.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER W. A. CORRELL; November 27, 1992

1. As indicated in the Board's November 5, 1992 decision certifying the applicant herein, the intervention of the Canadian Paperworkers Union and its Local 934 (hereinafter jointly refer to as the "CPU") was dismissed by a majority decision (Board Member Armstrong dissenting) in an oral ruling given at the hearing on November 4, 1992. Our reasons in that respect follow.

2. By application dated September 17, 1991 in Board File No. 2256-91-R, two employees of the respondent herein in a bargaining unit represented by the CPU applied for a declaration terminating those bargaining rights; namely, with respect to "all employees of the Company in its Plant situated at St. Marys, Ontario, save and except Foremen, and those above the rank of Foreman, Office Personnel, Sales Staff, watchmen and guards, and employees engaged in confidential capacity relating to labour relations". By decision dated June 24, 1992, now reported at [1992] OLRB Rep. June 682, which decision was unanimous in the result, the Board (differently constituted) found that not less than forty-five per cent of the employees in that bargaining unit at the time the application was made had voluntarily signified in writing that they no longer wished to be represented by the CPU, and directed that a representation vote be taken in that respect.

3. In the course of their June 24, 1992 decision, the majority of the Board reviewed some of the material facts as follows:

...

7. During the two and a half days that were devoted to hearing evidence and argument regarding this application, the Board heard testimony from the following three persons: the applicant Stephen Stacey, who at all material times was the President of Local 934; the applicant Frank King, who at all material times was the Local's Recording Secretary; and Bill Conley, a Local 934 steward who was also called as a witness by applicants' counsel. (Those three persons and all others holding office in the Local lost their positions when the Local was placed under trusteeship by the National following the commencement of these proceedings.) ...

8. The possibility of leaving the CPU was first discussed by members of the bargaining unit at a Local 934 meeting in February of 1991. At that meeting a motion was made that the Local hire a business representative, because it was felt that the Local was not getting enough assistance from the National. Concerns were also expressed about other matters, including what Mr. Stacey described as "political games being played at the top". The idea of leaving the CPU came up during the discussion of that motion. The motion was defeated at that meeting but another motion to the same effect was passed at a subsequent meeting (in March or April of 1991), as a result of which the Local hired as a consultant Gary Bucella (who, prior to being terminated by the National in the Fall of 1990, had been a CPU National Representative whose duties included servicing Local 934). Employee dissatisfaction with the CPU was also raised by some of the bargaining unit employees in discussions which took place following meetings of the Local in the Spring of 1991.

9. No CPU National Representative attended the "local issues" bargaining session that was held in August of 1991 in respect of the St. Marys plant. The only persons in attendance other than Company representatives were members of the Local 934 Executive and Mr. Bucella.

10. The idea of leaving the CPU resurfaced in September of 1991. At the regular meeting of the Local on September 7, 1991, Mr. Stacey reported to the membership that when the negotiation committee met with management to discuss local issues in August, "no one from the CPU bothered to show up that day". The members were extremely upset by that information and decided to discuss the matter further after the Local 934 meeting was adjourned. Accordingly, following the adjournment of that meeting, the forty to fifty people in attendance had a discussion about getting out of the CPU and looking elsewhere for another union. Mr. King and other members of the Local 934 Executive were aware from discussions with executive members from other

locals that employees at other Domtar plants were also thinking about leaving the CPU. This information was passed on to the membership during the course of the discussion which followed the adjournment of the September 7 meeting. During that discussion it was agreed that Mr. Stacey and another person (whose name was not disclosed in the evidence) would check out the employees' options by looking into other unions, and that they would get back to the membership at the next meeting of the Local. Mr. Bucella was also asked to look around "to see if there was anything out there". No decision was made on September 7 about whether or not to leave the CPU as Mr. Stacey and others involved in the matter felt that they "still had lots of time" because a company other than Domtar had been chosen as the CPU's target company, negotiations with that target company had not yet begun, and all that had occurred in respect of the Domtar negotiations was "the exchanging of main agendas".

11. The evidence also indicates that the outcome of the election of National officers that was to be held at the CPU convention which was to commence on September 16 was likely to have a bearing on whether employees in the bargaining unit would want to change unions or remain with the CPU. If there was a change in leadership, employees might wish to remain with the CPU, but if the incumbents were re-elected the employees would likely want to get out of the CPU.

12. On Friday, September 13, 1991, Don Snow, the President of CPU Local 309 (at the Company's Keele Street Plant) telephoned David Forrester, who at that time was the Vice-President of Local 934, to tell him that the National had applied for conciliation. Mr. Snow further indicated that if they wanted to keep their options open they only had until 5:00 p.m. on Tuesday, September 17 to get a decertification petition signed and presented to the "Labour Building". Mr. Snow also gave Mr. Forrester the wording of the petition and advised him that employees at other Domtar plants were taking similar steps. Mr. Forrester passed all of that information on to Mr. King, who took the wording home and used it to type the petition that was subsequently filed with the Board. The heading on the petition, which was typed by Mr. King on the letterhead of Local 934 and addressed to "Labour Building, 400 University Avenue, Toronto, Ontario", reads as follows:

We the undersigned no longer desire or wish to be represented by the Canadian Paperworkers Union as our bargaining agent with our company Domtar Packaging Inc.

13. There are eighty-one signatures on the front of the petition, and twenty-six more on the reverse, which does not contain a heading (or any other wording except those twenty-six signatures and the words "President Local 934" which appear after Mr. Stacey's signature). Thus, the petition contains a total of 107 signatures, 101 of which coincide with names on the list of employees filed by the intervener. (As indicated above, on the basis of that list it is common ground among the parties that there were 120 employees in the bargaining unit on the date of this application for purposes of the count.)

14. At the time he typed the petition, Mr. King understood the CPU to be the employees' bargaining agent and understood the wording of the petition to be indicating that the employees "want to get out of the CPU". He drew no distinction between the CPU and Local 934 because he thought they were one and the same. He was also of the view that if they got out of the CPU, the employees would find another union to represent them. He viewed the purpose of the petition to be keeping the employees' options open, with one of those options being that of remaining with the CPU if the employees wanted to do so. He did not type the petition on Local 934 letterhead for any particular reason, such as to indicate that Local 934 was supporting the petition; he merely used it because it was the only unused paper which he had on hand at the time he typed the petition.

15. Mr. King brought the petition with him to the plant when he reported for work on Sunday, September 15, 1991 for the midnight shift which runs from 11:00 p.m. to 7:00 a.m. During the course of that shift he obtained 27 signatures on the petition by bringing it to the employees at their machines during working hours and explaining to them that the purpose of the petition was to keep their options open. All of the employees working on that shift signed the petition. Some of the signatures were obtained as Mr. King moved around the plant performing some of his duties as a flexo bundler, which include speaking with other employees to obtain instructions

about customers' orders and walking through the plant to obtain various sheets and side panels. Others were obtained during periods in which he had temporarily completed all of his duties and was waiting for other employees to finish the work necessary to begin a new run. It is clear from the evidence that it was not unusual for Mr. King to be away from his machine several times during the course of a shift. The only member of management who was present during that shift was Carl Schmidt, who was the foreman on that shift. His desk is located thirty or forty feet away from the machine on which Mr. King is the bundler. Mr. Schmidt does not remain at his desk throughout the shift; he also moves around the plant, which occupies approximately 180,000 square feet. Although Mr. King was not particularly concerned about keeping Mr. Schmidt unaware of the petition, he did not discuss it with him. Moreover, we accept his evidence that neither Mr. Schmidt nor any other member of management was present when Mr. King obtained any of those signatures.

16. When Mr. King was not obtaining signatures on the petition he kept it in his back pocket. He put the petition in his locker around 6:30 a.m. (on September 16) and gave it to Mr. Conley about twenty-five minutes later. When he handed Mr. Conley the petition, Mr. King told him that the National had applied for conciliation and that in order to keep their options open to change unions they had to have a petition signed and brought to the Labour Board in Toronto by Tuesday. He asked Mr. Conley to take the petition around to the employees on his shift and then to give it to Mr. Stacey at the end of the shift. This conversation took place in front of their lockers as Mr. King's shift was ending and Mr. Conley's shift was about to begin. Mr. King selected him to circulate the petition on the day shift because he was the shop steward and no one on the Local Executive was working on that shift.

17. During the course of his eight-hour shift, Mr. Conley, who is also a flexo bundler, obtained over forty additional signatures on the petition. Some of the employees heard about the petition and approached Mr. Conley in order to sign it. Others signed when they came to his work station to resolve work-related problems. However, most of those signatures were obtained by Mr. Conley going over to the employees in their work areas during times when his presence was not required at his own machine, during his breaks, and during times when the duties of his position required him to leave his machine and go to other places in the plant. Mr. Conley told the employees that the National had filed for conciliation and that the only way to keep their options open was to submit a petition to the Labour Board. In response to questions, he also told some of the employees that one of the options was to stay with the CPU, depending upon who was elected at the convention. No member of management was present when any of those signatures were obtained. Only one of the employees whom Mr. Conley approached about signing the petition declined to do so.

18. As requested by Mr. King, Mr. Conley gave the petition to Mr. Stacey when he arrived for work shortly after 3:00 p.m. on September 16. Mr. Stacey had not had very much contact with members of the Local Executive or other employees during the preceding week because he was on the midnight shift and had been absent for several nights due to his son's hospitalization in London as a result of a serious accident. However, he was informed by Mr. Forrester of the National's conciliation application and the decertification petition when Mr. Forrester telephoned him late at night on Saturday September 14 or Sunday September 15 from Vancouver, where Mr. Forrester and Dan Richardson (the Treasurer of Local 934) had gone to attend the CPU convention. (Mr. Stacey had planned to attend the convention but was unable to do so because of his son's accident.) Mr. Forrester told Mr. Stacey that it was the President of the Keele Street CPU Local who had advised him of the National's application for conciliation. Mr. Forrester also explained that if they did not get the petition to the Labour Board by 5:00 p.m. on Tuesday, September 17 so as to obtain "a vote amongst all of the employees to see if they really truly wanted to leave the CPU", they would be locked in for the term of the next collective agreement. He told Mr. Stacey that Mr. King would circulate the petition on the midnight shift and then give it to the steward on the day shift, who after collecting signatures on that shift would give the petition to Mr. Stacey, so that he could "look after the 3:00 - 11:00 p.m. shift". Mr. Forrester also indicated that a number of other CPU locals were going to be doing the same thing.

19. After receiving the petition from Mr. Conley, Mr. Stacey obtained a further 38 signatures on it during the course of his shift. The first ten of those signatures were obtained around 3:45 p.m. while the corrugator of which Mr. Stacey is an operator was being repaired by maintenance

workers after breaking down. He obtained another signature around 4:45 p.m. when an employee who had heard about what was going on approached him at the corrugator and asked him to sign the petition. The next nine signatures were obtained in the cafeteria just after 5:00 p.m. during supper break. Before they signed their names on the back of the petition, those nine employees were told by Mr. Conley that it was a petition to decertify the CPU, which had applied for conciliation “behind [their] backs” and thereby placed them “under severe time limits”. He explained that the petition had to be presented to the Board by Tuesday September 17. He also explained that “by signing the document it did not necessarily mean that [they] would be leaving the CPU; it was merely a request to have a vote about leaving the CPU.” At least some of those employees read the front of the petition before signing their names on the back of it. The next six people signed at their (and Mr. Stacey’s) work station shortly after 7:00 p.m. while awaiting the return of the two maintenance department employees who were working on that shift. Mr. Stacey obtained the next ten signatures by visiting employees at their work station during his break. All of them read the petition and were provided by Mr. Stacey with an explanation similar to that described above. After signing the petition himself, Mr. Stacey obtained one additional signature by going to see an employee just before the end of the shift. That employee signed the front of the petition (after asking Mr. Stacey if there was any special place to sign and being told “wherever you can find a place to put your signature”). Most of the employees whom Mr. Stacey approached already knew about the petition before he spoke to them. No member of management was present when any of the signatures witnessed by Mr. Stacey were obtained. All of the employees whom Mr. Stacey approached concerning the petition signed it, with the exception of three employees who declined to do so.

20. Mr. Stacey returned the petition to Mr. King when the latter reported for work at 11:00 p.m. on Monday September 16. Mr. King put it in his locker and left it there until his shift ended at 7:00 a.m. on September 17. He then brought the petition to his home and, after having breakfast and visiting with his family until approximately 8:30 a.m., drove to Toronto and delivered the petition to the Board. He subsequently obtained facsimiles of a blank Form 17 application form and a completed Form 17 application form from Mr. Snow, and used the completed form as a precedent to assist him in filling out the blank form. After typing in the pertinent information on the form and having it signed by himself and Mr. Stacey, Mr. King forwarded it by courier to the Board.

4. The Board went on to reject the various submissions of the CPU that the application should be dismissed, including their assertion that the termination application (or the petition in support thereof) was either employer supported or otherwise not voluntary within the meaning of section 58 of the *Labour Relations Act*.

5. The representation vote directed by the Board was held on August 12, 1992. Of the 133 persons eligible to cast ballots, 109 did so, and 95 of them marked their ballots against the CPU.

6. No objection to the vote or statement of desire to make representations with respect to it was filed with the Board within the time fixed therefor. Accordingly, by decision dated August 28, 1992, the Board gave effect to the results of the representation vote and terminated the right of the CPU to represent the employees in the bargaining unit with respect to which the termination application had been brought.

7. Subsequently, by letter from counsel dated September 10, 1992 (some two weeks later) the CPU requested a reconsideration of the Board’s decision terminating their bargaining rights as follows:

We are writing to you in connection with the above-noted matter.

On or about August 25, 1992 we wrote to the Board requesting that the Board set aside the representation vote conducted by the Board.

On or about August 28, 1992 the Board rendered a decision terminating our client’s bargaining rights.

In view of our position as set out in our letter dated August 25, 1992, we request that the Board reconsider its decision of August 28, 1992 and accept our letter of August 25, 1992 as an Application in that regard.

Additionally, our client has reason to believe that an Application for Certification may have been filed or is about to be filed covering employees for whom our client previously held bargaining rights. In view of our continuing interest we request notice of any such Application.

In the August 25, 1992 letter to which the September 10, 1992 letter refers, counsel had written as follows:

We are the solicitors for the Canadian Paperworkers Union, Local 934 in connection with the above-noted matter.

On behalf of our client we request that the Board set aside the results of the vote and direct the taking a new representation vote. In the alternative in the event that a decision has already issued based on the results set out in the Officer's Report dated August 12, 1992 we request that the Board reconsider its decision, set aside the results of the vote and direct that a new representation vote be taken. Our reasons for so requesting are premised on the following:

1. Local 934 was placed into Trusteeship in the fall of 1991. Officers of the Local were removed from Office. The Company was notified of the Trusteeship and directed to deal exclusively with the Trustee, Mr. André Foucault. The Employer granted time-off with pay to the former Officers of the Local to pursue their Termination Application, including time-off with pay to attend the Board hearings.
2. During the week of July 27, 1992 following the Board order directing the representation vote, a Company supervisor attended by Mr. David Forrester, a leader of the drive to terminate the bargaining rights of our client, ordered a representative of our client to stop leafletting in the gate area.
3. During the same week the Plant Manager, Mr. Don Leslie, specifically directed representatives of our client to leave the plant gate area where they were actively campaigning[sic] on behalf of our client.
4. On or about July 30, 1992 representatives of our client were leafletting the plant at the gate. Employees in receipt of leaflets were accosted by Mr. Forrester and other employees as they entered the main plant doors and directed to throw the leaflets in boxes containing such slogans as "CPU propoganda"[sic] and Marvin's bullshit". Mr. Forrester and the other employees had been granted time-off with pay by the Company to attend at the plant door and ensure the destruction of the leaflets.
5. On or about August 10, 1992 a number of employees who supported the termination drive came out of the plant while on shift to prevent representatives of our client from discussing issues with employees entering the plant. These employees were allowed to leave their jobs in the plant while on shift and to remain off their jobs for an extended period in order to campaign against our client.
6. It is our position that the Employer has supported the Termination Application throughout and in light of the circumstances the vote should be set aside and a new vote ordered.

8. In dismissing this request for reconsideration (by decision dated September 23, 1992), the Board noted that CPU had failed to explain their failure to deliver their August 25, 1992 letter to the Board within the time fixed for making objections or representations with respect to the representation vote, and further found that there was nothing before the Board which would, in the circumstances, justify granting the request for reconsideration.

9. This application was filed on September 1, 1992. September 10, 1992 was fixed as the

terminal date for the application, the same day that the CPU requested a reconsideration of the Board's decision terminating their bargaining rights.

10. At the November 4, 1992 hearing, the CPU complained that they did not receive notice of this application until September 17, 1992, despite the fact that they had asked for it. Upon receiving notice, they arranged to be represented at a meeting scheduled by a Labour Relations Officer with respect to the application on September 18, 1992. Upon arriving for that meeting, however, they were informed that the application had been "waived" in accordance with the Board's standard waiver procedure and that the meeting had been cancelled. The CPU immediately filed an intervention in which they stated that it was their "position" that the application for certification "should be held in abeyance pending the disposition ... of the ... request for reconsideration" in the termination application as aforesaid. The CPU also asserted a "position" that the applicant herein is not a trade union within the meaning of the *Labour Relations Act* and had received support from the respondent employer, and that the application should therefore be dismissed.

11. It seems that this intervention, although received by the Board on September 18, 1992, went astray and did not find its way to the certification file until October 2, 1992. Subsequently, the Registrar scheduled the November 4, 1992 hearing to deal with the matter.

12. The CPU submitted that they were entitled to and did not receive timely notice of this application, and that they were entitled to participate in the application on the basis that the CPU's constitution contains provisions which provide that the employees of the respondent in the bargaining unit that the CPU had represented until their bargaining rights in that respect were terminated by the Board's August 28, 1992 decision in Board File No. 2256-91-R remained their members until three months later.

13. A trade union which seeks to intervene in another party's application for certification must establish that it either represents or is the bargaining agent for at least one employee in the bargaining unit which is the subject of that application. However, as the Board observed as long ago as *Napev Construction Limited*, [1976] OLRB Rep. Mar. 109, a trade union seeking to intervene in another party's application must either be the *present* bargaining agent or hold *representational authorization* from one or more persons in the bargaining unit. Evidence of representational authorization upon which a trade union seeking intervener status seeks to rely may be filed subsequent to the terminal date fixed for the application for certification in question. Indeed, it has been the Board's practice to accept such evidence as late as the hearing at which the issue of the right to intervene is dealt with (see for example, *Chukini Lumber Company Limited*, [1970] OLRB Rep. Apr. 63; *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305; *Les Ingenieries Consbec Inc.*, [1987] OLRB Rep. Nov. 1402).

14. The bargaining rights which the CPU held with respect to any of the employees in the bargaining unit affected by this application were terminated before this application was filed. The request for reconsideration in that respect was made after this application was made and did not in any way stay the decision terminating those bargaining rights. Consequently, the CPU was not the bargaining agent for any employees of the respondent affected by this application at any material time. In these circumstances, the CPU was not automatically entitled to notice of this application, either pursuant to Board Practice Note No. 8 or otherwise.

15. Further, a constitutional provision like the CPU's does not, by itself, constitute a sufficient representational authorization to entitle a trade union to intervene in a proceeding and purport to speak for employees to which the constitutional provision purports to apply. That is particularly true in circumstances where, as here, employees have voted overwhelmingly to terminate

the bargaining rights of a trade union which alleges that it still represents some or all of those employees solely on the basis of such a constitutional provision, and where there is absolutely no indication that any individual employee affected by this application for certification has even implicitly authorized it to do so.

16. Further, the CPU failed to explain why their attempt to intervene in this application was made as late as it was. They were clearly expecting an application and do not dispute that the usual Board Notices with respect to the application were posted a full week prior to the terminal date. The CPU's assertion that they received no notice of this application till September 17, 1992 when they received it from the Board, and their failure to intervene in a timely manner suggests that no affected employee alerted the CPU to the application and that no such employee wishes them to represent him/her in that respect.

17. In the result, the majority of the Board was not satisfied that the CPU was either the bargaining agent for or otherwise represented any employee affected by this application for purposes of this application. Nor was there any other apparent basis upon which the CPU had a right to intervene or participate in the application. The intervention was therefore dismissed as aforesaid.

DECISION OF BOARD MEMBER BROMLEY L. ARMSTRONG; November 27, 1992

1. I dissent.
2. I would have given status to Canadian Paperworkers Union and its Local 934.

0261-92-G; 0331-92-G; 0459-92-G; 0698-92-G International Brotherhood of Electrical Workers, Local 105, Applicant v. **Ellis-Don Limited**, Respondent; International Brotherhood of Electrical Workers, Local 773, Applicant v. **Ellis-Don Limited**, Respondent; International Brotherhood of Electrical Workers, Local 115, Applicant v. **Ellis-Don Limited**, Respondent; International Brotherhood of Electrical Workers, Local 120, Applicant v. **Ellis-Don Limited**, Respondent

Adjournment - Construction Industry - Construction Industry Grievance - Board rejecting employer submission that balance of convenience favouring granting adjournment and that it may suffer substantial and potentially irreparable prejudice if adjournment not granted - Adjournment request denied

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. H. Wightman* and *K. Davies*

DECISION OF THE BOARD; November 19, 1992

1. Further to the Board's September 21, 1992 decision herein, [now reported at [1992] OLRB Rep. Sept. 999], the respondent has requested that these proceedings be adjourned pending the disposition of the application for judicial review of the Board's decision in *Ellis-Don Limited*, [1992] OLRB Rep. Feb. 147. The parties have made written representations in that

respect and the Board is satisfied that the adjournment request can be dealt with on the basis of those representations.

2. In essence, the respondent submits that the balance of convenience favours granting its request and that it may suffer substantial and potentially irreparable prejudice if the adjournment it requests is not granted.

3. The applicants oppose the respondent's request. They rely on the submissions made at the hearing on June 18, 1992 in response to a similar request by the respondent, and the Board's reasons for denying the respondents request for an adjournment at that time (see paragraphs 6 to 8 of the Board's September 21, 1992 decision herein). The applicants submit that the respondent's request amounts to a request that these proceedings be stayed in circumstances where an application to stay the Board's decision in *Ellis-Don Limited, supra* was made to and dismissed by the Divisional Court. The applicants dispute the respondent's assertion that the balance of convenience favours an adjournment and submit that the contrary is true because there are collective agreement enforcement remedies which they are seeking in these proceedings as well as damages. The applicants also suggest that one alternative is to proceed and direct payment of any damages awarded into an appropriate interest bearing account in the names of the applicants to be held in escrow by them pending the final disposition of the application for judicial review in *Ellis-Don Limited, supra*.

4. In reply, the respondent states that the applicants' counsel, who is also counsel for the respondent trade union in the judicial review proceedings in *Ellis-Don Limited, supra*, is partly to blame for the delay in those proceedings because he has filed an appeal of Divisional Courts ruling on a motion in that proceeding. The respondent rejects the applicant's alternative suggestion on the basis that it would require an unprecedented and protracted proceeding. Further, the respondent submits that an adjournment would work no prejudice to the applicants.

5. Since labour relations delayed are labour relations defeated and denied, the general presumption is that proceedings before the Board should proceed with dispatch, unless the parties agree otherwise (see paragraph 6 and 7 of Board's September 21, 1992 decision herein). In addition, it is quite clear that the legislative intent is that section 126 applications, which these are, proceed expeditiously. In our view, this means that a respondent who seeks an adjournment, especially a lengthy one, must establish that there is a good reason to grant one, whether it be that the balance for convenience strongly favours an adjournment, or that there is a strong likelihood of a substantial irreparable prejudice to it if the matter proceeds.

6. In this case, it is quite clear that it is likely to take years rather than months before the application for judicial review in *Ellis-Don Limited, supra* is finally disposed of. On the other hand, it is not apparent that the balance of convenience favours an adjournment of these proceedings, or that any prejudice which the respondent may suffer if these proceedings are taken to their conclusion is either substantial or irreparable, particularly in light of the alternative (which is not necessarily the only one) suggested by the applicants with respect to the payment of any damages awarded.

7. In the result, we are not satisfied that there is a good reason to adjourn these proceedings as requested by the respondent. In our view, it is best to proceed while the evidence is still reasonably fresh. The respondents request is therefore denied. We wish to make it clear that the question of when and in what manner any damages which may be assessed in any of these matters are to be paid remains to be determined.

8. The Registrar is directed to schedule the applications herein for hearing.

0456-92-U John Huntley, Peggy Ng, Rod Potter, Majella Power-O'Connor, Lance Rankin, Eriks Rugelis, Jamie Spence, Veronica Timm, Carlos M. Marques, John G. Currell, Tony D'Agostino and Davie Collier-Brown, Complainants v. The York University Staff Association, Respondent

Adjournment - Duty of Fair Representation - Unfair Labour Practice - Complainants alleging that process leading to Pay Equity Plan with employer unfair and biased against certain employees in computing and technical classifications - Board denying union's motion to dismiss complaint for failure to plead *prima facie* case - Board also dismissing complainants' motion to adjourn pending disposition of related court proceeding

BEFORE: *G. T. Surdykowski, Vice-Chair.*

APPEARANCES: *William A. Harrison, John Currell, Eric Rugelis, Lance Rankin, John Huntley and Rod Potter for the complainants; Elizabeth Shilton, Jane Grant, Irena Singleton, Nancy Sperling and Bertha Kovacs for the respondent; Shelagh Young for York University.*

DECISION OF THE BOARD; November 27, 1992

1. As originally filed, this complaint alleged violations of sections 54(1) and 69 of the *Labour Relations Act*. Subsequently, the complainants advised the Board that they wished to proceed only with their complaint that they have been treated by the respondent in a manner contrary to section 69 of the Act.
2. The complaint came on for hearing on November 5, 1992. At that time two motions were made to the Board. First, the complainants moved that the hearing of the complaint be adjourned pending the disposition of a related court proceeding. Second, the respondent trade union moved that the complaint be dismissed because no *prima facie* case has been pleaded.
3. In support of the complainants' motion to adjourn, counsel advised that although he had previously had an indication that he would be retained in this matter, he had not been formally retained until some three days prior to the hearing and that he was not available for the November 17, 1992 hearing date. Counsel stated that he wanted a chance to frame the complaint properly and then get on with what he predicted would be a lengthy proceeding if it was necessary to do so.
4. In that latter respect, counsel submitted that the hearing of this complaint should not proceed at all until an application by Majella Power-O'Connor and John Currell (two of the complainants herein), in their personal capacities and on behalf of "the members of the bargaining unit of York University Staff Association known as Computer Series and Technical Series Employees" to the Ontario Court (General Division) was disposed of. "Jane Grant, President of York University Staff Association acting in her personal capacity and on behalf of the members of the bargaining unit of York University Staff Association, York University Staff Association and York University" have been named as the respondents to the court application. In the court proceeding the applicants (complainants herein) seek the following relief:
 - (a) An order that Jane Grant, President of York University Staff Association, be authorized to defend the proceeding herein on behalf of the members of York University Staff Association.
 - (b) A Declaration that York University Staff Association violated the provisions of its constitution and acted without authority in permitting the Pay Equity Negotiating Committee instead of its Bargaining Committee to negotiate the Collective Agree-

ment between York University Staff Association and York University for the period of September 1, 1992 to August 31, 1992.

- (c) A declaration that York University Staff Association through its Executive Board exceeded its constitutional authority and jurisdiction and acted without authority in authorizing and permitting the the [sic] Pay Equity Negotiating Committee to negotiate the aforescribed Collective Agreement with York University and enter into a Memorandum of Agreement dated April 7, 1992 purporting to bind York University and the York University Staff Association to the aforescribed Collective Agreement.
- (d) A Declaration that by exceeding its Constitutional authority and jurisdiction and acting without authority the execution of and entering into the Memorandum of Agreement dated April 7, 1992 by the members of the Pay Equity negotiating Committee is null and void and without force and effect.
- (e) A Declaration that the ratification of the aforescribed Memorandum of Agreement on April 30, 1992 by the members of the York University Staff Association is a nullity and has no force and effect.
- (f) A Declaration that the aforementioned Collective Agreement be and is hereby set aside and is not binding upon the members of York University Staff Association or York University.
- (g) Costs of the Application.

Counsel submitted that if the court application succeeds, the proceedings herein would *probably* be unnecessary.

5. Counsel advised that the court application had been scheduled to be heard on October 17, 1992, but was adjourned on consent at the respondent trade union's request and is now scheduled to be heard on January 29, 1993.

6. The respondent opposed an adjournment and submitted that the complaint should be dismissed. Counsel conceded that there is some overlap between the court application and this complaint but submitted that there is no reason to defer consideration of this complaint pending the disposition of the court application. Counsel submitted that the delay inherent in the kind of adjournment requested by the complainants is inimical to labour relations and that it is not just and reasonable to put off dealing with the complaint, particularly if, as the respondent argued was the case, there is no *prima facie* case pleaded in the complaint.

7. The respondent submitted that the essence of this complaint is a challenge to the Pay Equity Plan which it has negotiated with York University, on the basis that this Plan fails to recognize the value which some of the technical and computing employees have placed on themselves. Counsel briefly reviewed the effects of the Pay Equity Plan and conceded that the computing and technical classifications have lost their previous wage advantage over the female job classifications in the bargaining unit as a result of that Plan. Counsel submitted that, in essence, the complainants are employees who are dissatisfied with the Pay Equity Plan which the respondent has negotiated and that this is not a section 69 (duty of fair representation) problem. Counsel further submitted that the Board has no jurisdiction to set aside the Pay Equity Plan, if that is what the complainant seeks.

8. Finally, the respondent submitted that if the Board was not prepared to dismiss the complaint, the matter should proceed immediately.

9. In response to the respondent's motion to dismiss, the complainants submitted that they

have pleaded a *prima facie* case, namely that their interests were not fairly considered or represented by the respondent in the Pay Equity process.

10. A representative of York University attended at the November 5, 1992 hearing. However she made no submissions to the Board and subsequently advised that York University would not be participating in the proceeding before the Board.

11. Upon considering the representations of the parties with respect to the two motions, I dismissed them both in a brief oral ruling.

12. As far as I am aware, there has been no previous application or complaint arising out of the workings of the *Pay Equity Act* which has been determined by the Board. In my view, the Board should exercise its discretion to dismiss a complaint for failing to disclose a *prima facie* with caution and only in the clearest of cases, particularly where, as here, the case is one of first impression (see, *Elizabeth Balanyk*, [1987] OLRB Rep. Sept. 1121; *J. Pavia Foods Limited*, [1985] OLRB Rep. May 690).

13. The complaint in this case is both complex and novel. It also raises potentially difficult questions of evidence, law and policy. As pleaded, the complaint alleges that the process which led to the Pay Equity Plan was unfair and biased against the complainants. Though implicit, it is nevertheless clear that the complainants allege that the respondent has represented them in a manner which is arbitrary, discriminatory or in bad faith, contrary to section 69 of the *Labour Relations Act*. I was satisfied that the allegations in that respect, if proved, are sufficiently capable of arguably supporting a conclusion that the respondent has breached its duty to the complainants under section 69 of the Act and that the complaint should not be dismissed without a hearing on the merits. Further, there appeared to be no cogent reason why the Board could not or should not entertain the complaint.

14. With respect to the complainants' request for an adjournment, it is well understood that labour relations delayed are labour relations defeated and denied (*Re Journal Publishing Co. of Ottawa Ltd. et. al. v. Ottawa Newspaper Guild, Local 205, OLRB et. al.* [1977] 1 ACWS 817 (Ontario Court of Appeal)) and that delay in labour relations matters often works unfairness and hardship (*Re United Headwear and Biltmore/Stetson (Canada) Inc.*, (1983) 41 O.R. 2d (287)). Subject to the rules of natural justice and fairness, the Board enjoys a broad discretion to determine whether and in what circumstances proceedings before it should be adjourned (*Re Flamoro Downs Holdings Ltd. and Teamsters Local 1879*, (1979) 24 O.R. 2nd 400 (Ontario Div. Court)). In recognition of the need to proceed with labour relations matters expeditiously, it is the Board's well established practice not to grant adjournments except on consent of all parties or where the Board is satisfied that there are extenuating circumstances such that an adjournment is appropriate.

15. Where a party seeks to have a matter before the Board adjourned pending the disposition of a related juridical proceeding, whether that is an application for judicial review or some other proceeding, the Board determines whether the interest of justice and the balance of convenience in the particular proceeding before the Board favour such an adjournment (see, for example, *Four B Manufacturing Ltd.*, [1978] OLRB Rep. Sept. 829; *Cable Tech Wire Company Limited*, [1978] OLRB Rep. Oct. 895; *Ellis-Don Limited*, [1992] OLRB Rep. Sept. 999).

16. This complaint was filed on May 2, 1992. A Labour Relations Officer was assigned to the complaint to meet with the parties to try to settle the matter. The Officer convened meetings on May 26 and June 15, 1992. After the Officer advised the Registrar that the complaint had not been settled, the Registrar scheduled the matter to be heard on November 5 and 17, 1992. The

parties were advised of this by Notice of Hearing dated September 15, 1992. The court proceeding initiated by the complainants was begun on October 8, 1992 - some five months after they filed this complaint and after they knew of the hearing dates scheduled for it. Counsel for the complainants is also counsel for them in the court proceeding. Not only did the complainants not specifically retain Mr. Harrison with respect to this proceeding in a timely manner, but at the time they did so and counsel accepted the retainer, they all knew of the hearing dates which had been scheduled. Notwithstanding that and their position in their motion to adjourn herein, the complainants consented to the adjournment of the court proceeding and sought instead to have this complaint adjourned. These are not circumstances which suggest that it is appropriate to grant a request for an adjournment by the complainants.

17. Further, although there does appear to be some overlap between this complaint and the court application, it is far from obvious that they are congruent. Indeed, it seemed to me unlikely that the disposition of the court application would be determinative of this complaint, whatever the result in that application. This Board has the exclusive jurisdiction to deal with "fair representation" complaints under the *Labour Relations Act*, and in my view is the appropriate forum for resolving what appears to be the dispute between the parties. In the result, I was not satisfied that it was appropriate to adjourn the matters requested by the complainants. On the contrary, this dispute has already festered long enough and should be resolved as soon as possible.

18. For the foregoing reasons, the complainants' motion to adjourn and the respondent's motion to dismiss were both dismissed.

19. I then set further dates for the hearing of this complaint in consultation with the parties as follows: December 3, 10, 14, 15, 21 and 23, 1992 and February 3, 4, 8 and 9 and 10, 1993, commencing 9:30 a.m. in the "Board Room" 6th Floor, 400 University Avenue, Toronto, Ontario. Having regard to these available dates, I cancelled the November 17, 1992 hearing date (without objection from the respondent).

20. The complainants then again requested an adjournment to permit the parties to discuss and delineate the issues between themselves. The respondent again opposed this request and asked that the hearing proceed.

21. I dismissed this request for an adjournment as well. The complainants are proceeding first and can frame their case and the issues as they wish (within the limits of their complaint as pleaded). In no way is what they do in their case chief defence driven. In the absence of consent from the respondent, I saw no reason to adjourn the hearing.

22. The respondent then asked that the complainants be directed to specify the remedies they are seeking herein and which they have not done in their complaint. The complainant suggested no reason why they could not do so prior to December 3, 1992 (the next scheduled hearing day) and indeed counsel said that the complainants would do so. I therefore directed the complainants to specify the remedies they seek herein, in writing, at least seven days before December 3, 1992.

23. The hearing will continue as scheduled.

1896-90-U National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada), Complainant v. Kautex of Canada Inc., Respondent

Discharge - Discharge for Union Activity - Unfair Labour Practice - Board not satisfied that employer's reasons for discharging grievor entirely free of improper motive - Evidence indicating that legitimate reasons co-existing with unlawful reasons - Complaint allowed - Reinstatement with compensation ordered

BEFORE: *Judith McCormack*, Chair, and Board Members *R. W. Pirrie* and *E. G. Theobald*.

APPEARANCES: *Dan Flynn*, *F. Berto* and *Tony Robinson* for the complainant; *Theodore Crljenica* and *Ian Davis* for the respondent.

DECISION OF JUDITH MCCORMACK, CHAIR, AND BOARD MEMBER E. G. THEOBALD;
November 17, 1992

1. This is a complaint under section 91 [formerly section 89] of the *Labour Relations Act* in which the complainant union alleges that Tom Robinson was discharged contrary to sections 3, 65, 67 and 71 [formerly sections 3, 64, 66 and 70] as a result of exercising his rights under the Act. The respondent company denies this allegation and asserts that Mr. Robinson's termination was for cause, and not in violation of the Act.

2. The respondent company manufactures plastic gas tanks for the automotive industry in Windsor, Ontario. Mr. Robinson was hired on September 18th, 1989 and there was no dispute that he completed his three month probationary period satisfactorily. Since that time he has performed a number of different jobs, including operating a blow-molding machine used for the initial forming of the tanks, a subject to which we will return later.

3. In January of 1990, the union commenced an organizing drive at the company's plant. Mr. Robinson attended a union meeting on January 27th at the Teutonia Club with approximately eight other employees. He signed a union membership card that day, and although initially he was not very active, over the next few months he gradually became more involved in the campaign. In response to that campaign, the company issued several bulletins to employees. In April of 1990, one of these bulletins apparently referred to employees' right to choose with respect to unionization, and included a passage to the effect that if employees were harassed or intimidated by persons involved in the union, the latter's employment could be terminated.

4. During the same time period, Mr. Robinson was summoned by his supervisor, Tim Treleven, to the office of Suk Singh, then the company's plant manager. Another employee, Bill Arquette, was present. Mr. Singh asked Mr. Arquette whether Mr. Robinson had harassed him into signing a union card, and Mr. Arquette said that he had not. The conversation concluded shortly thereafter.

5. By May, it appears that Mr. Robinson was one of a group of five or six employee organizers in the plant. He did not collect many, if any, membership cards, although he did distribute T-shirts and hats with the union's name on them, attend meetings of the organizers and speak to other employees about union membership. Generally speaking, we find his evidence with respect to his role in this regard inflated; however, there is no doubt that he was active in organizing activities to some extent.

6. On May 8th, 1990 Mr. Robinson received a written warning from the company for absenteeism and tardiness which referred back to incidents commencing in February of 1990. The company has an absenteeism and tardiness discipline program involving the application of demerit points. No demerit points were assessed against Mr. Robinson at that time, although the warning stipulated that he must provide notes for his absences.

7. The union filed an application for certification with the Board at the beginning of June. On June 7th, 1990 one of the other employee organizers told Dan Flynn, a staff organizer for the union, that there was a committee of anti-union employees meeting at the French-Canadian Club. Mr. Flynn arranged to meet Mr. Robinson and the other employee organizer at this club, where a group of employees who had voiced opposition to the union were sitting at a table. Seated with this group was Mr. Treleaven, and Mr. Singh arrived a little later. Mr. Flynn had brief conversations with both Mr. Treleaven and Mr. Singh. It appears that Mr. Treleaven and Mr. Singh would have seen Mr. Robinson in the company of Mr. Flynn and the other employee organizer.

8. Over the next two months, there was some turnover in management with Steve Diemer replacing Mr. Treleaven, and Dirk Berthel, an employee of the company's parent company in Germany, taking over from both Suk Singh and the manufacturing manager. That month Mr. Robinson was absent several times. He provided doctor's notes for two absences but not for a third.

9. In June or early July, Mr. Robinson was assigned to relieve another employee on a welding machine. The safety guards were down on the machine and Mr. Robinson, who was a member of the health and safety committee, informed Mr. Diemer accordingly. He then waited for Mr. Diemer to return, performing no work on the machine in the meantime. Mr. Diemer took him upstairs where he and Sue Fiorini, another supervisor, questioned him and told him that he was insubordinate. Ms. Fiorini began to write out a warning, and Mr. Robinson was ordered to leave the plant. Mr. Robinson refused to sign the warning notice, and Ms. Fiorini crumpled it up and threw it at him. Eventually, the two supervisors allowed Mr. Robinson to return to his machine. In his evidence, Mr. Diemer acknowledged that he and Ms. Fiorini had made a mistake, and that the meeting should not have occurred. When Mr. Diemer was asked in cross-examination whether Ms. Fiorini ever talked to him about the union, he replied that there was talk about the union all the time. When he was then asked whether she had made any negative comments about the union, he responded that it depended on what would be called negative. Counsel for the company objected to the evidence with respect to this meeting on the basis that it was not particularized in the complaint. At the time, the Board reserved its decision on both the admissibility of this evidence and the weight, if any, to be accorded to it. At this point, it is our view that this incident is of such marginal probative value that we are not inclined to assign any weight to it. As a result, it is not necessary for us to determine its admissibility.

10. Mr. Robinson was absent from work on July 8th and July 11th, 1990. He asserts that he presented a note for his July 8th absence to Mr. Diemer, who tore it up and said to Mr. Robinson that it was not going to help him or "your little group". Mr. Robinson also asserted that he submitted a note for his absence on July 11th. The company assessed Mr. Robinson twenty-five demerit points for each of these two absences. Its position was that the July 11th note was misplaced, and that no note was presented by Mr. Robinson for his absence on July 8th. Mr. Diemer testified that he did not tear up any note and that he did not make the statement set out above.

11. Mr. Singh also held a meeting with Mr. Robinson on July 17th. According to Mr. Diemer, the purpose of this meeting was to find out why Mr. Robinson had been absent on July 11th. However, it appears that the demerit points for July 11th were actually imposed in advance of this meeting by Mr. Diemer, who testified that he had spoken with Mr. Robinson about it,

although he could not recall the discussion. At the meeting Mr. Singh quizzed Mr. Robinson on where he had been on July 11th, and Mr. Robinson responded with an excuse that was not particularly credible. Subsequently, Mr. Singh issued a memo to Mr. Robinson to the effect that he was required to provide verification of all absences. In the memo, Mr. Singh indicated that this requirement was imposed because of Mr. Robinson's record of fifty demerit points, that is, the demerit points imposed for the absences of July 8th and July 11th.

12. On August 17th, 1990 Mr. Robinson did not attend for his shift. He notified the company to this effect, but did not supply a reason or a note. The respondent increased his demerit point level to seventy-five points. Mr. Diemer also recommended a five day suspension. In his evidence, he could not recall whether Mr. Robinson had actually served the suspension or not, and told the Board that he did not know whether Mr. Robinson ever received the warning notice imposing the additional demerit points. Unlike the other three previous notices, this notice was not signed by Mr. Robinson acknowledging receipt.

13. In fact, as it turns out Mr. Robinson did not serve this suspension. The company called Mr. Robinson to a meeting with Mr. Berthel, Mr. Diemer and Ian Davies, the company's new human resources manager. (Mr. Davies, who was not employed full time by the company at this point, appears to have been involved in these events only to a limited extent.) Charlie Akins, another employee who was also a member of the union's organizing committee, attended at Mr. Robinson's request. Mr. Berthel asked why Mr. Akins was at the meeting, and Mr. Robinson replied that he wanted to have Mr. Akins as a witness. Mr. Berthel then said that Mr. Robinson did not need a witness, as they were just having a meeting. However, he allowed Mr. Akins to stay.

14. Mr. Davies and Mr. Berthel told Mr. Robinson that the company was going to suspend him for five days for absenteeism. Mr. Robinson testified that he was shocked by this and insisted that he had provided notes for his absences. He then examined the documentation in his personnel file which the company had at the meeting, and showed the company officials a note in the file for his July 11th absence.

15. As a result of this note, the company's officials changed their minds and told Mr. Robinson that he would not be suspended. Mr. Robinson then demanded copies of the documentation in his file, which the company agreed to provide. Mr. Robinson testified that he also said that he wanted to take the documentation to the union because he felt he was being harassed. This last evidence was also objected to by the company as not having been particularized in the complaint. Again, the Board reserved its decision on both weight and admissibility, and again we find that this evidence is of so little probative value that we are not inclined to place any weight on it. There is no dispute that Mr. Berthel declined to give Mr. Robinson a copy of the suspension letter that the company had prepared, for the simple reason that he was no longer being suspended. In addition, at this meeting Mr. Robinson was asked to provide the company with notes for his July 8th and August 17th absences.

16. Mr. Akins told the Board that one week later, he himself was suspended. He also testified that all of the employee organizers had been disciplined at one time or another. Of five people on the organizing committee, he indicated that only two still work for the company. There were five other section 91 complaints filed by the union, which were settled on terms that included a condition that the union could not rely upon them in any other proceedings. As a result, we have not considered this fact in our ultimate decision.

17. Mr. Robinson was summoned by the respondent to a further meeting on August 27th. Attending that meeting were Mr. Berthel, Mr. Davies, Mr. Diemer and Terry Tetrault, a fellow

employee, whom Mr. Robinson had asked to attend as a witness and for “moral support”. At that time, Mr. Robinson produced a note from his lawyer confirming that he had been in court on August 17th for his preliminary hearing. Mr. Robinson was himself the subject of the criminal charges involved. Subsequently, Mr. Berthel sent a memo to Mr. Robinson that, among other things, took issue with this note. He indicated that although Mr. Robinson’s lawyer had said that he was “required” to attend court on August 17th, since he had not actually been subpoenaed, according to Mr. Berthel his attendance was voluntary.

18. At the meeting on August 27th, the company officials present reiterated that Mr. Robinson must have a valid note for each absence or tardy arrival, that he must call in before the start of his shift if he was going to be absent or late, and that his notes had to be provided to his supervisor before he started his next shift. Mr. Davies told the Board that the company would not necessarily require this from every employee, but that Mr. Robinson was getting to be a problem and needed clear guidelines. Because of Mr. Robinson’s allegation that Mr. Diemer had torn up one of his notes, Mr. Berthel agreed that Mr. Diemer would sign and date each note Mr. Robinson provided, and return a copy to him. Mr. Berthel testified that the respondent provided photocopies of the documentation in Mr. Robinson’s personnel file to Mr. Robinson at this meeting, an assertion which is disputed by Mr. Robinson and Mr. Tetrault.

19. On September 5th, Mr. Robinson did not report for his scheduled shift. He brought in a doctor’s note the following day, and as a result the respondent did not assign demerit points to him. However, an employee warning notice was issued indicating that Mr. Diemer had reminded him that he must call in when he was going to be absent. It is not clear whether the notice was given to Mr. Robinson, although Mr. Diemer thought he may have shown it to him. The notice is not signed by Mr. Robinson acknowledging receipt.

20. On September 14th, 1990 the applicant was certified to represent employees of the respondent. On September 15th, Mr. Robinson was absent from work and the following day he was six hours late for his shift. He brought in a doctor’s note for September 15th, but not for September 16th, and the company imposed twenty-five demerit points for the latter absence. Mr. Diemer testified that he recommended that a five day suspension also be imposed. An employee warning notice dated September 16th and imposing a five day suspension was filled out by Mr. Diemer and signed by Mr. Berthel. Mr. Arthurs testified that normally an investigation takes place before action like this is recommended, but that on this occasion, the notice had been prepared first and the matter then investigated. It appears that the company was not prepared to wait to see if Mr. Robinson brought in a note on his next scheduled shift for September 16th, perhaps because he had actually attended for part of his shift on September 16th.

21. Mr. Robinson’s next scheduled shift was September 19th, starting at 7:00 o’clock p.m. Mr. Berthel and Mr. Arthurs waited for Mr. Robinson to inform him of his suspension. However, Mr. Robinson called in and spoke to Mr. Tetrault, saying that he would not be in as he was in court. Mr. Tetrault told the Board that it was common for him to answer the telephone in the evening and that he relayed this message to Mr. Diemer. The next day, Mr. Tetrault was told by the company not to answer the telephones any more. On September 20th, Mr. Robinson called in again and spoke to Mr. Davies, who was again waiting with Mr. Berthel to suspend him again. He told Mr. Davies that he had been in court all day and that he could not come in and work a twelve hour shift. Mr. Davies testified that he asked him to bring in documentation, but that he did not say anything about a suspension to Mr. Robinson at that time.

22. September 24th, 1990 was Mr. Robinson’s next scheduled shift. Mr. Robinson did not present any documentation for his absence on September 19th and 20th and the company assigned

him twenty-five demerit points for each absence. Again, it appears that the employee warning notices to this effect were never given to Mr. Robinson. Mr. Diemer acknowledged that he had no chance to discuss the September 20th warning with Mr. Robinson as he normally would, because senior management wanted the notice the next day. As a result, he did not know why Mr. Robinson was absent at the time he imposed demerit points. He agreed in cross-examination that it would have been better to speak to Mr. Robinson before he prepared the warning notice, but said that it was out of his hands at that point.

23. Mr. Davies acknowledged in cross-examination that he had called Mr. Robinson's lawyers to confirm that Mr. Robinson had been in court on September 19th and 20th. He said that he did so because he wanted to see whether these were acceptable absences. In other words, company officials knew Mr. Robinson was in court on September 19th and 20th when they decided to impose discipline. Mr. Davies explained this by saying that although he knew Mr. Robinson had been in court, this did not address the fact that Mr. Robinson had not called in until 7:40 p.m. on September 20th, forty minutes after his shift started. It is clear that there were breaks in the court proceedings earlier on September 20th, during which Mr. Robinson would have had an opportunity to call the company. Mr. Robinson was in fact convicted of criminal charges on September 20th, and it was apparent that he was somewhat stunned by this turn of events.

24. On September 24th, Mr. Robinson attended for his scheduled shift but no mention was made of a suspension on that day. Mr. Robinson's job at that time was to relieve the blow-molding machine operators during their breaks. Around 3:30 a.m. he presented himself at a blow-molding machine operated by Eric Mitchell for this purpose. Mr. Mitchell advised him that the machine had been malfunctioning, and that as a result, it was dropping the blow-molded tanks into the machine enclosure, rather than on a slide adjacent to the back of the machine. The effect was that Mr. Mitchell had to run around to the back of the machine each time and pull the tank out with his hands. Mr. Mitchell testified that he had informed Mr. Diemer of this problem several times during that shift, and had asked him to get a technician to adjust the flash weight, but that he did not hear back from him. In contrast, Mr. Diemer first told the Board that nobody had complained about the machine. However, when he was asked in cross-examination whether Mr. Mitchell had complained two or three times that the machine was malfunctioning, he said that he could not recall.

25. The first tank that the machine produced under Mr. Robinson's operation at this time fell on the floor between the machine and the slide where it was retrieved by Mr. Robinson. He then set up the machine for the cycle on the next tank by placing a reservoir in the appropriate spot and closing the doors to the machine enclosure. This second tank was blow-molded as usual by the machine, but was then dropped into the machine enclosure rather than on the slide.

26. At this point, there is a conflict in the evidence. Mr. Robinson testified that he attempted unsuccessfully to retrieve the tank by pulling it out of the enclosure with his hands. The company asserts that Mr. Robinson was away from his work station when the tank dropped, chatting with a fellow employee down the line. At any rate, there is no dispute that the machine cycle began again with the fallen tank still inside. The mold form itself closed on the tank, damaging both the fallen tank and the new tank which was to have been blow-molded in that cycle. The effect was also to break a water line on the machine. As a result, the machine was out of operation for approximately thirty minutes while the water line was replaced.

27. Mr. Robinson told the Board that when he was unsuccessful in retrieving the tank and the water line broke, he yelled to a nearby employee to get a mop and pail and a technician, and he himself went to find Mr. Diemer. He arrived back at the machine at the same time as Tibor

Nagy and Froy Romero, two of the company's technicians. Mr. Diemer testified that when he himself arrived on the scene, Mr. Nagy and Mr. Romero told him that they had seen Mr. Robinson speaking to another employee some feet away several minutes before the incident. Mr. Nagy also gave evidence to this effect, although Mr. Romero said that he had not seen Mr. Robinson speaking to another employee. Mr. Robinson agreed that he had spoken to two other employees on the line, but said that this was after the machine malfunctioned because other employees were wondering why there was water on the floor.

28. Mr. Diemer was a little unclear as to the steps he took to investigate the incident. At one point he said that he asked Mr. Robinson what had happened before speaking to Mr. Nagy and Mr. Romero, and that he had not subsequently confronted Mr. Robinson with what Mr. Nagy and Mr. Romero had told him. Later, he changed his testimony and said that he had spoken to Mr. Robinson after speaking to Mr. Nagy and Mr. Romero. He was not sure initially if he had ever asked Mr. Robinson where he had been when the latter arrived back at the machine at the same time as the technicians. Then he testified that he did ask Mr. Robinson this question and that Mr. Robinson said he had gone looking for a technician. Mr. Diemer told the Board that he thought that that was a good answer at the time. When he was asked in cross-examination why Mr. Robinson was later fired if it was a good answer, he replied both that his subsequent investigation revealed otherwise and that it was out of his hands. Mr. Diemer told the Board that he did not believe Mr. Robinson's story, but acknowledged that Mr. Robinson did not have a chance to explain his version of events.

29. The company's position was that Mr. Robinson was not at his work station at the time the tank fell, and that if he had been, he could have prevented the damage to the tanks and the machine by stopping the cycle, either by pushing a red button on the machine or by opening the doors to the machine enclosure. Mr. Robinson, Mr. Akins and Mr. Mitchell told the Board that employees were discouraged from pushing the red button. Mr. Diemer testified that he could not say whether employees had been told not to push the red button, although he himself had not given these instructions.

30. On September 25th, Mr. Berthel scheduled a meeting with Mr. Robinson. According to Mr. Berthel, the purpose of this meeting was to see if Mr. Robinson could explain his two absences on September 19th and 20th and the blow-molding incident, and that if he could not, he would be suspended pending termination. However, even Mr. Diemer testified that Mr. Robinson was not given an opportunity to explain his side of the story at this meeting. Earlier that day, Mr. Berthel signed three warning notices for the September 19th and 20th absences and the blow-molding incident. Brian Zarin, another employee who was at this meeting, testified that Mr. Berthel simply announced that Mr. Robinson was being placed on indefinite suspension and that no reasons were given. When Mr. Robinson asked for a reason, Mr. Berthel replied that Mr. Robinson knew the reason. The meeting lasted approximately five minutes.

31. In contrast, Mr. Berthel told the Board that he asked Mr. Robinson for an explanation for the absences on September 19th and 20th and the blow-molding incident at the meeting, but that Mr. Robinson had no explanation for them. He agreed that Mr. Robinson gave him a note from his lawyer accounting for his absences on September 19th and 20th, but said that this was only at the end of the meeting. Subsequently, Mr. Robinson started talking about fishing with Mr. Berthel. Both Mr. Berthel and Mr. Arthurs testified that Mr. Berthel reviewed Mr. Robinson's absenteeism and then referred to the blow-molding incident.

32. Mr. Robinson's version of this meeting is that Mr. Berthel opened it by asking him whether he had a note or some document to give him for September 19th and 20th. Mr. Robinson

asked whether anyone had spoken to Mr. Davies, and said that he had told Mr. Davies where he was on those dates. Mr. Berthel replied that they did not have time to go into this, and that he was sorry but that Mr. Robinson was suspended. He told him to go home, and that the company would be in contact with him. Mr. Robinson asserts that Mr. Berthel also said that if the company was wrong, it would pay for it, and that Mr. Berthel did not mention the blow-molding incident on that day.

33. On September 28th, Mr. Berthel sent a letter to Mr. Robinson terminating his employment and purporting to set out his disciplinary history. The company concedes that there are some inaccuracies in that letter. Seventy-five demerit points were imposed by the company for the blow-molding incident. When these were added to the fifty demerit points imposed for the absences of September 19th and 20th, according to Mr. Berthel the total was 225 accumulated points, and he advised in the letter that Mr. Robinson's employment was terminated. Somewhere around this time, Mr. Robinson ran for a position for the union's bargaining committee but was not successful.

34. On the basis of this sequence of events, the union asserts that Mr. Robinson's employment was terminated either because of his union activities or because the company wished to be rid of him before a collective agreement was negotiated with the likely result of a just cause obligation. The company asserts that its officials did not know Mr. Robinson was a union organizer although they were aware he supported the union campaign, and that he was terminated solely as a result of his tardiness and absenteeism record and the blow-molding incident.

35. This is a matter to which section 91(5) applies, which reads as follows:

91.-(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

36. In *The Barrier Examiner*, [1975] OLRB Rep. Oct. 745, the Board set out its approach to allegations where section 91(5) applies:

17. What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof "that any employer ... did not act contrary to this Act". In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.*, [1974] OLRB Rep. July 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

37. Subsequently, the Board reiterated in *The Corporation of the City of London*, [1976] OLRB Rep. Jan. 990 that the anti-union motivation does not have to be the sole reason, or even the predominant reason for the activity complained of to violate the Act, so long as it is one of the reasons. Then in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, the Board described the difficulties inherent in this kind of proceeding:

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real rea-

son or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti-union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti-union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement for inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if The Labour Relations Act has been violated.

38. In the instant case, we have examined the reasons advanced by the company for Mr. Robinson's discharge not because we are adjudicating their reasonableness or their fairness, but because it is a step in the more complex process of ascertaining the employer's motivation. (*Hallowell House Ltd.*, [1980] OLRB Rep. Jan. 35).

39. There are a number of aspects of the respondent's conduct which cause us some concern in this case. Mr. Robinson's employment problems commenced at about the same time as his union involvement, and he was in fact discharged approximately two weeks after the union was certified to represent employees. In addition, it was clear that the company was attempting to build a paper record against Mr. Robinson, sometimes in a manner that was quite artificial. For example, the first warning that Mr. Robinson received about his absenteeism was not until May 8th, 1990, although that warning purported to cover a period back to February of 1990. This raises the question of why nothing was said to Mr. Robinson in this regard between February and May of 1990 or conversely, why it was not until May of 1990 that this issue was raised. Indeed, Mr. Arthurs testified that he did not have any concerns about Mr. Robinson's attendance or tardiness until the summer of 1990.

40. Moreover, some of the documentation prepared by the company was either inaccurate or inflated. For example, Mr. Robinson's termination letter refers to his failure to call in to say that he would be absent for his shift on September 19th. The undisputed evidence was that Mr. Robinson did call in and spoke to Mr. Tetrault, who then relayed this information to Mr. Diemer. Mr. Berthel explained this discrepancy by saying that Mr. Robinson's call was not valid because he did not speak directly to his supervisor, and that he had been told to speak to supervisors previously. This letter also cites that no reason was given when Mr. Robinson called in about his absence on September 20th. Again, there is no dispute that Mr. Robinson told Mr. Davies that he had been in court all day and could not come in and work a twelve hour shift that evening. And in fact, the company was aware as a result of Mr. Davies' inquiries that Mr. Robinson had been in court on September 19th and 20th. Mr. Berthel explained this by saying that no reason was given for why Mr. Robinson called in at 7:40 p.m. rather than before his shift started at 7:00 p.m.

41. Similarly, the memo from the company in August taking issue with the note from Mr. Robinson's lawyer on the basis that he was not "required" to attend court because he had not actually been subpoenaed appears somewhat unreasonable, since Mr. Robinson was the subject of the proceedings. Another discrepancy involves the company's intention to suspend Mr. Robinson in

August in part as a result of an absence for which it asserted there was no note, when there actually was a note in the company's personnel file. In addition, the company's assertions that they were unaware of Mr. Robinson's organizing activities were not particularly credible in light of the meeting with respect to Bill Arquette and the meeting at the French-Canadian Club where Mr. Robinson accompanied Mr. Flynn. The fact that Mr. Treleaven and Mr. Singh eventually left the employ of the company does not suggest otherwise to us, since they left at different times and there was a significant amount of overlap with the tenure of new members of management such as Mr. Diemer.

42. The way in which Mr. Robinson's disciplinary record was compiled also reflects some artificiality. For example, on at least one occasion it appears that discipline was imposed before the company investigated, rather than after. It also appears that at least three, and perhaps four of the employee warning notices which were presented to the Board were not given to Mr. Robinson at the time that they were prepared. The notices are clearly designed to be delivered to employees as they provide spaces for employee comments, an acknowledgement of receipt by the employee, and the employee's signature. This is also significant in light of Mr. Arthurs' testimony that if his own signature or that of Mr. Berthel was not on a document and the employee did not sign it, then it was not "issued". In addition, Mr. Diemer, Mr. Arthurs and Mr. Berthel were somewhat vague as to which of them played various roles in the disciplinary notices and assessments. Mr. Arthurs and Mr. Diemer in particular were uncertain about various aspects of these events, and could not remember at times who recommended the imposition of some of the demerit points, whether the notices had been given to Mr. Robinson, why the notices were sometimes signed by one or the other of them and sometimes not, when they were signed, why they were dated when they were, when or whether they spoke to each other about the notices and with who else they discussed them.

43. On the other hand, there is no doubt that Mr. Robinson was a highly undesirable employee from the respondent's point of view. Not only was he absent or late without notice on quite a number of occasions, but it is clear that the company's officials were skeptical of both his reasons and his notes. We share that skepticism. Indeed, at the close of Mr. Robinson's cross-examination by counsel for the company, it is fair to say that Mr. Robinson's evidence was almost entirely lacking in credibility. As a result, where there was a conflict between Mr. Robinson's testimony and that of another witness, we have for the most part preferred that of the other witness. Moreover, it is possible that some of the discrepancies in the company's conduct can be at least partially ascribed to ineptitude, rather than improper motivation.

44. In reviewing the evidence as a whole, however, we find that we are not satisfied on the balance of probabilities that the respondent's reasons were entirely free of improper motives. Rather, on balance we think that the evidence indicates that this is the kind of case described in *The Barrie Examiner*, *supra*, and *Pop Shoppe*, *supra*, where legitimate reasons for Mr. Robinson's discharge co-exist with unlawful reasons. In other words, even though Mr. Robinson was an undesirable employee from the company's point of view, the discrepancies in the company's conduct set out earlier together with other evidence including the timing of these events and the company's knowledge of Mr. Robinson's union activities indicate that his deficiencies as an employee were not the only reason his employment was terminated. Having regard to the onus under section 91(5) and the Board's jurisprudence in this regard, we find that the respondent violated section 67 of the *Labour Relations Act*.

45. We therefore direct that Mr. Robinson be reinstated to his employment with the respondent, and that the respondent pay compensation to him for lost wages and benefits together with interest in accordance with the Board's practice note in this regard.

DECISION OF BOARD MEMBER RÖSS W. PIRRIE; November 17, 1992

1. I dissent.

2. The majority has it correct when it records at paragraph 43 that Mr. Robinson "... was a highly undesirable employee..." and that his "... evidence was almost entirely lacking in credibility." Beyond those observations I disassociate myself from this award.

3. The majority hold that on the one hand Robinson was a highly undesirable employee, but on the other the employer was not quite straightforward in dealing with and disciplining him, and that some of their case against him was manufactured. While the employer did not do the most sophisticated job of managing Mr. Robinson and administering its own discipline system, I find nothing in the evidence to suggest that they were out to get Robinson or that there was anything artificial about what they did. Mr. Robinson's total lack of credibility was not only a factor which this Board had to deal with. It was a factor with which the company's representatives had to deal with on the job on a day to day basis. I cite one incident which I feel typifies the situation they faced.

4. Mr. Robinson did not show, nor did he call in advance to say he would not be in for work on July 11, 1990. This is a day on which he was scheduled to work the 7:00 a.m. to 7:00 p.m. shift. Mr. Robinson was assessed 25 demerit points under the company's disciplinary system, and on July 12 - his next scheduled work day - the plant manager convened a meeting to provide Mr. Robinson with an opportunity to explain his absence. Mr. Robinson's explanation was that when he got up for work in the morning there was a note on the refrigerator that there was a doctor's appointment for Tommy Robinson at 9:00 a.m. that day. He went to the doctor named in the note. However, when he got there for the 9:00 a.m. appointment he found that it was for his son - also named Tommy Robinson. He did not bother to call in before the start of his shift or before he left for the doctor's office. When at 9:00 a.m. he found the appointment was not for him, he went home. Not surprising the company's representatives were skeptical of his explanation. In the meeting their skepticism was voiced, but Mr. Robinson stuck to his story. He could not tell the company representatives the name of the doctor or provide any details about the nurse, the receptionist etc. All he knew was that the office was at or in the 1100 block of Ouellette Street. When the plant manager offered to drive Mr. Robinson to the doctor's office to verify the incident, Mr. Robinson refused the offer and stated he would do his best to remember the doctor's name. This was not the end of the story. Mr. Robinson subsequently produces a doctor's note from The Urgent Care Centre on Tecumseh Road East for a visit on July 11. The note states he was "unfit" for "work" and that he "may return tomorrow". Absolutely no relationship to this explanation for the absence.

5. I would ask, how or why would the management of the company put any credence in what Mr. Robinson would have to say on any subject. But that was not the end of the incident. Because Mr. Robinson produced a note for July 11, the company rescinded the twenty-five demerit points. Not very bright on their part, but also not exactly the actions of an employer out to get Mr. Robinson, as the union urges and as my colleagues believe.

6. Mr. Robinson had a lousy attendance record. The company tried to deal with that issue. At paragraph 17 and 18 the majority review a meeting convened on August 27, 1990 by the new plant manager, Mr. Berthel. This meeting was followed up with a memo dated August 31st to Mr. Robinson confirming the matters discussed. The majority at paragraphs 17 and 41 make much of what is an obvious error on the part of the new plant manager concerning the issue of a subpoena for an August 17 absence when Mr. Robinson was in court. At the same time the majority dis-

misses out of hand the effort and the offer by the company to assist Mr. Robinson with his absentee difficulties. The last three paragraphs of the memo read as follows:

"It was expected that Mr. Sigh's memo to you of July 17, 1990 made clear the requirements regarding certification of absences, however, we make this last attempt at communicating this requirement nevertheless. I truly hope that by following such a clear procedure we can avoid misunderstandings in the future.

Tommy (Robinson), I want to be very clear. Your attendance has not been satisfactory and it must improve. Failure to improve would result in suspension, and ultimately discharge. I hope this unpleasant solution won't be necessary, however you are the only one that can decide that.

If I or anyone of the staff at Kautex can help you meet your employment obligations better, please go and get that help. We are willing to help if we can."

Not exactly the actions of an employer out to get one of their employees as my colleagues believe.

7. What happens next? Robinson does not show for work on September 5, 1990, nor does he call in. He does however provide a doctor's note for the absence the following day. His supervisor prepares an Employee Warning Notice dated September 6 covering the incident, on which he records "(Robinson) brought in doctor's note for September 5 but talked to him and reminded him that he must call in when he is going to be absent". No demerit points are assessed against Mr. Robinson. At paragraph 19 the majority observed "it is not clear whether the notice was given to Mr. Robinson, although Mr. Diemer (his supervisor) thought he may have shown it to him. The notice is not signed by Mr. Robinson acknowledging receipt".

8. There is no observation on the part of my colleagues that Mr. Robinson's failure to call in to let his supervisor know that he would be absent is yet another example of his irresponsible behaviour. No, but at paragraph 42 the fact that the Employee Warning Notice was not signed by Mr. Robinson is cited as part of the artificial record created by the company. This Employee Warning Notice assesses no demerit points, and it plays no part in Robinson's ultimate termination. It simply records the fact that his supervisor spoke to him about calling in. My view of this document is that rather than bolster the proposition that it is part of the grand conspiracy on the part of the company, it is in fact yet another example of the leniency the company showed Mr. Robinson. Coming as it does just days after the August 31st memo the company could quite legitimately have jumped all over Robinson for not calling in.

9. Further I take serious issue with the entire notion of "artificiality" expressed in paragraph 42. There are indeed a number of Employee Warning Notices which Mr. Robinson did not see or sign. In each instance there is a perfectly logical and plausible explanation as to why Robinson did not see or indeed sign them, which the majority will not accept. Instead they choose to see this as part of a company conspiracy to get Mr. Robinson.

10. Concerning the blow-mold incident I am of the firm conviction it occurred in the manner and for the reasons described by the company. The union's witnesses to the incident, in particular Mr. Mitchell and Mr. Robinson himself, are simply not credible. Mr. Mitchell, for example, placed the incident on the wrong shift and on the wrong break on the shift. This together with the balance of his evidence concerning the blow-mold having malfunctioned on every mold throughout his shift, and that despite numerous complaints to this supervisor no action was taken to correct the malfunction is simply not to be believed. As for Mr. Robinson I don't think I need say more.

11. The majority take no position as to what caused the damage to the blow-mold machine and the two tanks. Again what they do is seize on what they see as some shortcomings in the com-

pany's procedure around investigating the incident and the handling of Mr. Robinson's eventual termination as part of their conspiracy to get rid of him.

12. The majority at paragraphs 39 through 42 make their case that the company effectively conspired to build its case against Mr. Robinson in order to terminate him because he was one of the key union organizers responsible for having the C.A.W. organize Kautex.

13. Let me first say I have a great deal of trouble with the proposition that Mr. Robinson was anything more than a bit player in the organizing activity. He witnessed two membership cards out of some one hundred and twenty, one of which was used by the union. He handed out C.A.W. T-shirts and hats and he attended meetings. The evidence that he was one of the "key organizers" came from Mr. Flynn. Mr. Flynn was the union's representative responsible for the C.A.W. organizing campaign. He was the union's first witness in this case, following which he acted as counsel for the union in presenting this case to the Board. I am somewhat skeptical of the value of the answers to questions that are effectively posed by the same person. As for Mr. Robinson the best he could say for his role in the organizing campaign came in cross-examination when he was asked if he was one of four, then six, then eight of the key in-plant organizers. In answer in each instance was "I was involved".

14. Two incidences are cited by the majority in paragraph 41 to make their case that the company had to be aware of Robinson's organizing activities. The Arquette incident in April as set out in paragraph 4 and the June meeting at the French-Canadian Club at paragraph 7. By the time Robinson's attendance record gets truly serious in August the management representatives in these two incidents have terminated their employment with the company. There is no evidence whatsoever that Mr. Diemer, or any of the other members of management involved in Mr. Robinson's termination, were aware of the two incidences. There is no evidence whatsoever that other than Robinson being a supporter of the union that he was significantly involved in the organizing campaign. There is no evidence whatsoever that these considerations played any part in Robinson's termination.

15. Not once from January to September 1990 covering the period in which the C.A.W. conducted its campaign leading to certification, and during which it is maintained the company was out to get Mr. Robinson, did the union take a single step to defend this "key" organizers. No Section 91 complaint was filed with the Board, no discussions with the company officials by Mr. Flynn. Instead we have evidence of Mr. Flynn telling Mr. Robinson to comply with the company rules, because he knows Mr. Robinson is not doing so.

16. Did the acts of omission or commission on the part of the company occur as set out in paragraphs 39 through 42? It would appear they did. Do they justify finding they were part of the reason Robinson was terminated? I think not.

17. At paragraph 39 there is the concern that "... Mr. Robinson's employment problems commenced at about the same time as his union involvement". Mr. Robinson was hired in mid-September 1989 on three month's probation. He maintained a perfect attendance record during the probation period to mid December 1989 and on through January 1990. In February 1990 he is absent once and late twice, in March he is late twice, and in April Mr. Robinson is absent once and late or left early four times. The company speaks to him about its concerns, confirms its concerns in writing in early May requiring that he produce verifiable notes for future absences. It assesses no demerit points. If one wants to make a connection to union involvement I guess one can, but I fail to see it.

18. Also at paragraph 39 "... he was in fact discharged approximately 2 weeks after the

union was certified... “So what. The company did not set the date on which the union was certified, it did not control the dates on which Mr. Robinson was absent, and it certainly did not control the date on which Mr. Robinson caused the blow-mold incident. A connection to union involvement - I guess so if you want to believe.

19. Continuing at paragraph 39 “... the company was attempting to build a paper record against Mr. Robinson sometimes in a manner that was quite artificial...”. Clearly the company was documenting events as they occurred - events which Mr. Robinson controlled. One can imagine the majority’s comments if there had been no documentation. And, as noted earlier, I find absolutely nothing “artificial” about the documentation.

20. I agree with the majority at paragraph 42 that the company’s explanations were vague about some of the details around incidents involving Mr. Robertson’s case. I did not put this down to their fabricating their testimony as I did with respect to most of the union’s witnesses.

21. In summary, Mr. Robinson was a very undesirable employee and on his own evidence he was not to be believed on virtually any subject. He created the incidents for which he was terminated, and they had nothing to do with a supposed role in the union. In my opinion the company met its onus of proof and I would have dismissed the union’s complaint.

2140-90-U United Food and Commercial Workers International Union, AFL, CIO, CLC, Complainant v. Peter Gorman & Sons (Wholesale) Ltd., Respondent

Damages - Remedies - Unfair Labour Practice - Board earlier directing reinstatement of grievor with compensation - Parties unable to resolve matter of compensation - Employer alleging failure to mitigate - Although some area employers had job openings in relevant period and someone in grievor’s position could have tried harder to secure employment, Board satisfied that grievor made reasonable efforts to mitigate his losses - Employer directed to fully compensate grievor

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *R. W. Pirrie* and *K. Davies*.

APPEARANCES: *Roman Stoykewych*, *Kevin Corporan*, *Kevin Benn* and *Deborah Smith* for the complainant; *Walter Thornton* and *Peter Gorman* for the respondent.

DECISION OF KEN PETRYSHEN, VICE-CHAIR, AND BOARD MEMBER K. DAVIES;
November 17, 1992

1. This is a complaint filed under section 91 [formerly section 89] of the *Labour Relations Act*. In a decision dated June 11, 1991, a majority of the above panel directed the respondent to reinstate Mr. Anthony and to compensate him for his losses with interest. The Board was asked to relist this matter since the parties were unable to resolve the amount of compensation, if any, owing to Mr. Anthony. During three days of hearing concluding on October 27, 1992, the parties presented their evidence and submissions on the issue of whether Mr. Anthony satisfied the obligation to mitigate his losses. The parties requested the Board to remain seized in order to deal with the quantum issue should it conclude Mr. Anthony was entitled to damages.

2. The complainant called Mr. Anthony to testify. The respondent called three individuals

employed by three companies in Peterborough to give evidence. In making its factual determinations, the Board has carefully reviewed the oral and documentary evidence and the parties submissions. The respondent argues that the evidence should lead us to conclude that Mr. Anthony is entitled to well less than one-half of his damages as a result of his failure to mitigate his losses.

3. The Board does not propose to review in detail the evidence called by the parties. The complainant claims that Mr. Anthony is entitled to all of his losses arising during the relevant period, namely from November 6, 1990 to June 19, 1991. Mr. Anthony testified that within a week of his termination he began his job search and filed for unemployment insurance. He indicated that he checked the board at the Unemployment Insurance Office for employment opportunities. Mr. Anthony also registered with Manpower Temporary Services and was able to receive some part-time work from this source. He indicated that he approached Manpower Temporary Services on an average of once a week attempting to secure employment. Mr. Anthony did not subscribe to the local newspaper but would obtain a newspaper on an average of once a week in order to check for job openings. In addition, Mr. Anthony spent two or three days a week looking for a job. He was looking for work in areas where he had some experience and would pay at least seven dollars per hour. The complainant filed with the Board a document prepared by Mr. Anthony setting out the firms Mr. Anthony approached for work between November 1990 and June 1991. On average, Mr. Anthony contacted twenty firms each month and more often than not, left a resume or filed an application. Mr. Anthony testified that during the relevant period he did not refuse any job offer.

4. The three witnesses called by the respondent testified that they had jobs available and hired individuals during the relevant time frame. Mr. Anthony testified that he just did not think of approaching these employers. In reviewing the evidence, the respondent asks us to find Mr. Anthony was not a credible witness and to conclude that he did not make any serious efforts to mitigate his losses.

5. In their submissions, counsel referred to the following cases: *Red Deer College v. Michaels et al.*, (1975), 57 D.L.R. (3d) 386 (S.C.C.); *Canada Post Corporation v. Canadian Union of Postal Workers* (Teplitsky, unreported, January 22, 1992); *Jacmorr Manufacturing Limited*, [1987] OLRB Rep. Aug. 1086; *Re City of Toronto and Canadian Union of Public Employees, Local 79* (1987), 29 L.A.C. (3d) 233 (Jolliffe); *Re Carling O'Keefe Breweries of Canada Ltd. and Western Union of Brewery, Beverage, Winery & Distillery Workers, Local 287* (1984), 20 L.A.C. (3d) 67 (Beattie); *Re Canada Post Corp. and Canadian Union of Postal Workers (Belle)* (1989), 6 L.A.C. (4th) 232 (Jolliffe).

6. In our view, the appropriate principles to apply when a failure to mitigate issue arises are contained in *Jacmorr Manufacturing Limited*, *supra*, and need not be recited here. On the evidence before us, the Board is unable to conclude that Mr. Anthony failed to mitigate his losses. It may be that some employers had job openings in Peterborough during the relevant period and that someone in Mr. Anthony's position could have tried harder to secure employment but these are not determinative of the issue before us. The Board is satisfied in the circumstances that Mr. Anthony made reasonable efforts to mitigate his losses and that he is entitled to be compensated for his losses.

7. Having regard to this conclusion regarding mitigation, the Board directs the respondent to fully compensate Mr. Anthony for his losses including interest calculated in the usual way. We continue to remain seized of the quantum issue.

DECISION OF BOARD MEMBER ROSS W. PIRRIE; November 17, 1992

1. I dissent.
2. The concern which caused me to dissent from the original award reinstating Mr. Anthony, namely his credibility, still persists. I don't believe Mr. Anthony made reasonable efforts to mitigate his losses.
3. Mr. Anthony's job search efforts are summarized in his own document which lists monthly, the establishments which he contacted. A cursory review of these lists indicate it does not represent anything like a reasonable attempt to find alternative employment. In terms of the quantitative aspects of the search, Mr. Anthony testified he would have spent less than fifteen minutes on average a day on each potential employment approach. Based on his list this would represent less than fifteen minutes a day devoted to finding employment. In terms of the qualitative aspects of this search it falls far short of a serious or meaningful attempt to find a job.
4. With respect to the *Jacmorr Manufacturing* case cited at paragraph six above, while the authors of that award set out some general comments which suggests a complainant in an unfair labour practice case involving a violation of the *Ontario Labour Relations Act* need not mitigate his damages, they went on to give consideration to that very issue. Their finding in that fact situation was that the grievor had mitigated her damages. As stated above I don't believe that to be so in this case.

1321-91-R; 3098-90-R Ottawa-Carleton Public Employees Union, Local 503, Applicant v. Regional Municipality of Ottawa-Carleton and Carlington Community Services Centre and Dalhousie Community Services Centre and Gloucester Community Services Centre and Lowertown Community Services Centre and Overbrook Community Services Centre and South East Ottawa Community Services Centre and Vanier Community Services Centre and Centretown Community Services Centre, Respondents; Ottawa-Carleton Public Employees Union, Local 503, Applicant v. Regional Municipality of Ottawa-Carleton and Pinecrest-Queensway Health and Community Services, Respondents

Related Employer - Sale of a Business - Union asserting that non-profit community centre and regional municipality carrying on related activities in provision of social services under common control or direction - Union submitting, in alternative, that there had been transfer of administration and delivery of social services constituting sale of a business - Municipality's assistance and participation not translating into control or direction - No transfer - Applications dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. A. Correll* and *H. Peacock*.

APPEARANCES: *David Jewitt, Lorne Carter, Gwen Spencer* and *Richard Bigelow* for the applicant; *Russel Zinn* and *Dianna Jossa* for Pinecrest-Queensway Health and Community Services, respondent; *Donald W. Wilson, M. Rick O'Connor* and *Rob Kirwan* for Regional Municipality of Ottawa-Carleton, respondent.

DECISION OF THE BOARD; November 13, 1992

1. Originally, these two matters were scheduled to be heard together. However, on the first day of hearing the parties agreed to adjourn Board File No. 1321-91-R pending the disposition of the application in Board File No. 3098-90-R. Having regard to the agreement of the parties, Board File No. 1321-91-R was so adjourned.

2. The name of the respondent Pinecrest-Queensway Community Services Centre is amended to: "Pinecrest-Queensway Health and Community Services".

3. Board File No. 3098-90-R is an application for relief under section 1(4) and 64 [formerly section 63] of the *Labour Relations Act*. Section 1(4) provides that:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

Section 64 applies to what is commonly known as "successor employer" or "sale of a business" situations. The purpose of both provisions is to preserve a trade union's bargaining rights from being eroded as a result of corporate restructuring or commercial transactions.

4. In this application, the applicant trade union asserts that the respondent Pinecrest-Queensway Health and Community Services (the "P-Q Centre") and the respondent Regional Municipality of Ottawa-Carleton (the "Region") carry on related or associated business or activities in the provision of social services under common direction and control, and that the P-Q Centre and the Region therefore constitute one employer for purposes of the *Labour Relations Act*. Further, and in the alternative, the applicant submits that there has been a transfer from the Region to the P-Q Centre of the administration and the delivery of social services which constitute a sale of a business within the meaning of section 64 of the Act. The applicant asserts that its bargaining unit has already been eroded in that a number of bargaining unit positions have been lost and that there is a potential for further erosion in the future. The applicant seeks the usual declarations in that respect and relief for affected employees.

5. The respondents deny that they are engaged in associated or related activities under common control or direction or that there has been a sale of a business between them.

6. Section 1(4) applies to situations in which activities which generate employment relations governed by the *Labour Relations Act* are carried on through more than legal entity, whether or not at the same time. This provision gives the Board the power to pierce the corporate veil and declare two or more entities to constitute one employer for purposes of the Act where the Board is satisfied that they are engaged in associated or related activities under common direction or control. In that respect, section 1(4) modifies traditional common-law notions which are based upon the separation between legal entities and the privity of contract. It is a remedial provision intended to prevent the intentional or incidental frustration or erosion of established bargaining rights consequent upon changes in the structure or form of what is, for labour relations purposes, a single business or activity. To put it another way, whatever separation may exist between two or more entities for corporate, tax or other purposes, the Board is entitled to treat them as being one employer for labour relations purposes if they carry on associated or related activities under common control or direction. The purpose of section 1(4) is to protect the bargaining rights of a trade union and the rights of employees to bargain collectively with their employer through that trade union from being undermined by the form, or an alteration of the form, of a business or activity. In

applications under section 1(4), the Board is concerned with the functional relationship between entities. Businesses or activities are “related” or “associated” because they are of the same character, serve the same general market, employ the same mode or the means of production, utilize similar employee skills, or are carried on for the benefit of related principals (see, for example, *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 and October 1353). Where the Board is satisfied that two or more entities carry on associated or related activities or businesses under common control or direction, which may but does not necessarily include control over employees, the Board may declare that those entities constitute one employer for purposes of the *Labour Relations Act*. The effect of such a declaration is that the affected entities share the rights and obligations of an employer under the Act and any applicable collective agreement.

7. Section 64 has the same purpose and a similar effect. Like section 1(4), it recognizes that a “business” is a concept which does not lend itself to precise definition. Rather, a business is an economic activity (whether for profit or not) which can be conducted through a variety of legal vehicles or arrangements. It is the activity, not its form, which give rise to employee-employer relationships which are regulated by the Act and to which bargaining rights attach. Consequently, under the *Labour Relations Act*, bargaining rights attach to an activity as an employer rather than to a particular employer name or form of employer, and so long as that activity continues bargaining rights continue to exist. As in section 1(4), common-law or commercial law concepts have limited application to section 64 applications. Indeed it is those very concepts which led to the problems which the two provisions are intended to remedy.

8. The term “business” is not limited to a commercial or profit making activity. Sections 1(4) and 64 apply equally to traditional commercial activity and to municipalities, school boards, hospitals and other non-profit undertakings which have employees. It is the labour relations aspect of a “business” which is the focus of sections 1(4) and 64. In that respect, it is the continuity of the “activity” which is significant. “Business” is not necessarily synonymous with a particular group or kind of employees or the “work” they perform. Concomitantly, bargaining rights do not necessarily attach to particular work or employees. Although a continuity of work may be significant, it is not always sufficient to justify a finding that two or more entities constitute one employer, or that there has been a sale of a business. The focus of the inquiry under both section 1(4) and section 64 is the total economic organization, not just the employees or the work performed (see *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *British American Bank Note Co.*, [1979] OLRB Rep. Feb. 72; *Kitchener-Waterloo Hospital*, [1991] OLRB Rep. Oct. 1130).

9. The purpose of sections 1(4) and 64 of the *Labour Relations Act* is to preserve established bargaining rights, not to extend them or to create bargaining rights where there were none. Further, though they apply to any business or activity, neither provision can be applied mechanically, particularly where the activities under scrutiny are not traditional commercial activities, or where there are parties involved other than the particular entities with respect to which an application has been made. This is especially true when any of the parties involved in the overall picture are arms or agencies of a government or otherwise have statutory duties and responsibilities (see, for example, *The Ontario Legal Aid Plan*, [1989] OLRB Rep. Aug. 862, [1990] OLRB Rep. Jan. 118 (Div. Ct.); [1991] OLRB Rep. Nov. 1327, (1992), 6 O.R. (3d) 481 (Court of Appeal), in which the Court of Appeal emphasized, as did the original Board majority decision, that a funding control does not, by itself, amount to common direction or control within the meaning of section 1(4)).

10. In this case, the Board has before it hundreds of pages of documentary evidence and days of oral testimony. We do not intend to review the evidence or the representations of the par-

ties. Suffice it to say that we have carefully reviewed and considered all of the evidence and representations before the Board.

11. The applicant trade union is the bargaining agent for certain employees of the Region; namely, all employees who have not been specifically excluded from the scope of the collective agreement between the applicant and the Region.

12. The Region is a municipality within the meaning of the *Municipal Act*, the *Municipal Affairs Act*, and the *General Welfare Assistance Act*. It is a second tier municipal government body with responsibilities for a number of Ottawa-area municipalities. As such, it provides a wide range of typical regional government services, including the delivery of social services as mandated by various pieces of legislation, including the *General Welfare Assistance Act*, the *Homemakers and Nurses Services Act* and the *Day Nurseries Act*.

13. The P-Q Centre is a non-profit corporation established to identify and meet local community needs by developing social services and co-ordinating the delivery of its own and social service agency social services within the Pinecrest-Queensway area of Ottawa. The boundaries of this area are the Ottawa River on the North, Baseline Road on the South, Woodroffe Avenue on the East and the Ottawa City Limits on the West.

14. The P-Q Centre is one of twelve community Centres in Ottawa. From their inception, the purpose of these Centres has been to facilitate and co-ordinate the delivery of social services on a local community basis and to provide an easily accessible source of information and advice in that respect at a neighbourhood level. The theory was (and is) that social services would be more accessible and more effectively delivered on a community service centre model managed and operated at the local neighbourhood level. In practice, this has meant a physical collocation of various social service agencies in the Centres from which their programs and the Centres' own programs are delivered to the community.

15. The first Centre, Lowertown East, was begun in 1965 on the initiative of some direct service agencies working in that particular community. A second, first known as the Rochester Unit, then as the Dalhousie Health and Community Services and now as "Somerset West", was formed at the request of residents of the community it serves a year or two later. From the very beginning, funding was a major concern. Initially, the Region and the Children's Aid Society contributed approximately 60 per cent and 40 per cent respectively towards the "administrative and supervisory" costs, and direct services were provided by seconded workers from participating agencies. From somewhat modest beginnings, the Centres have developed into a sophisticated social services development and delivery network.

16. The Children's Aid Society of Ottawa-Carleton, the Region, the Ottawa-Carleton Regional Area Health Unit, the Family Service Centre, the Catholic Family Service, the Ontario Ministry of Community and Social Services, the Ontario Ministry of Health, and the Youth Services Bureau have all played a prominent role in the development of the community centres. In effect, the centres have brought together a number of agencies including, in this context, the Region.

17. The P-Q Centre had its beginnings in the late 1970's. From very early on, the Region played a significant supporting role. The applicant asserts that the Region's "support" for the P-Q Centre was such that it was really being run and administered by the Region, or, in the alternative, that the Region transferred part of its social service function to the P-Q Centre. The applicant points to the role played by the Region in procuring the various premises from which the P-Q Centre has operated over the years, to the furniture and equipment provided by the Region, and to the

P-Q Centre access to the Region's mail and purchase order systems. The applicant submits that the Region's internal documents, public pamphlets, and the telephone directory all identify the P-Q Centre as a Region-administered community centre and demonstrate the nature of the relationship. Further, and most importantly from its point of view, the applicant relies upon the presence of and work performed by Region employees, particularly the "Co-ordinator", at the P-Q Centre. All of this, argues the applicant, serve to show that the P-Q Centre was integrated into and controlled by the Region. In the alternative, the applicant points to the activities of the P-Q Centre and submits that the Region has transferred responsibility for delivery of the social services it is responsible for to the P-Q Centre.

18. With respect, we do not agree.

19. The Region has indeed played a significant role in the development of the community social service centres in Ottawa, including the P-Q Centre. More specifically, the Region played a prominent role in procuring the various premises from which the P-Q Centre has operated. Indeed, the P-Q Centre's first premises was leased in the Region's name. It is also true that much of the P-Q Centre's original start-up and administration costs were covered by the Region, through both funding and in-kind contributions. It is true that there are Region documents which suggest that the "Region has launched and sustained a remarkable service delivery structure capable of integrating the funding initiatives of all levels of government with the programs and services of public and private agencies and with the involvement of local residents", that the Centres were bound by the Region's policies, and that centre autonomy was a Region initiative. It is also true that there are Region documents which refer to the P-Q Centre, among others, as being "Regionally administered" and which discuss an "autonomy" program for the P-Q Centre and other Centres so that they can become "independent from the Social Services Department".

20. It is also true that it is unlikely that the P-Q Centre would be what it is today without the Region's assistance, both initially and over the years.

21. However, there is also little doubt that there would indeed be a P-Q Centre which would not look terribly different either. Further, the Region's assistance and participation did not, in our view, ever translate into control or direction of the P-Q Centre. Nor did the Region ever delegate or transfer to the P-Q Centre responsibility for the social services which the Region is charged with delivering.

22. On the contrary, whether it be a dictionary definition or the Region's own definition of autonomy (that is: "the quality or state of being self-governing") which is applied, the P-Q Centre always was autonomous in the sense that, through its Community Board of Directors, it assumed responsibility for the co-ordination of the delivery of social services from the P-Q Centre and control of its own programs and operations.

23. The idea for the P-Q Centre came from a diverse group consisting of community residents, local politicians and social service professionals working in the Pinecrest-Queensway community. Borrowing somewhat on the earlier community experience in Lowertown East and what is now Somerset West, they sought to create a community based social service delivery scheme which would enable the community to help itself. As the idea which came to manifest itself as the P-Q Centre developed, the Region was identified as the most readily available source of the funding which was so crucial to its early development. The Region recognized the merit in the idea and responded positively, though somewhat tentatively at first, to the community groups' overtures in that respect. The Region agreed to provide a co-ordinator, a receptionist and office space. With time, the Region became satisfied that the community resource centre model was a viable and useful concept, and increased its commitment, both generally and specifically to the P-Q Centre.

24. However, since its initial important infusion of resources, the Region's sustaining role, though still important, has diminished in relative terms. In any event, the Region's role has always been that of a supportive funder, not a directing or controlling one.

25. The Region could have simply provided funding to the P-Q Centre. However, it chose to provide people and other "in-kind" assistance in addition to funding, not because it wanted to control or direct the P-Q Centre (though it was obviously concerned with how the P-Q Centre would use the resources it provided to it), but because it was more economical to do so as a result of a 50-50 cost sharing with the Province available with respect to the people provided and the availability of in-kind resources.

26. Even prior to incorporation, the P-Q Centre had, as it does now, a Board of Directors which was heavily dominated by community representatives and aggressively independent. However, the Board of Directors had to find its feet and until it did so, it leaned rather heavily upon the Region and the personnel supplied by the Region. This resulted in a certain tension between the P-Q Centre and the Region, and between the Board of Directors and the first co-ordinator, until the parameters of the relationship, and the P-Q Centre's independence were more clearly established.

27. As we have already indicated, the P-Q Centre's first co-ordinator was a Region employee who came to the P-Q Centre as part of the Region's funding contribution to it. In those early days, everyone, and no one less than the Board of Directors, recognized that the P-Q Centre needed a co-ordinator to assist the Board of Directors. The Board of Directors saw the co-ordinator as being an advisor and resource person whom it could consult as part of its decision-making process, and as the person who would oversee the implementation of the decisions and initiatives of the Board of Directors. The first co-ordinator did not see things quite this way. She viewed the P-Q Centre as a kind of adjunct to the Region's social services department and herself as a representative of the Region. A conflict quickly developed and came to a head. In the result, the Board of Directors secured the removal of this first co-ordinator.

28. The Region then moved unilaterally to assign a new co-ordinator to the P-Q Centre. The Board of Directors quickly and effectively voiced its displeasure and concern. After some discussion, and only after the Board of Directors was satisfied that this second co-ordinator, and the Region, understood and accepted the co-ordinator's role as the Board of Directors saw it, did the P-Q Centre accept the second co-ordinator.

29. The P-Q Centre's actions were inconsistent with the suggestion that it was subordinate to the Region. Further, the dispute and its resolution established, at a very early stage, the relationship between the P-Q Centre and the Region. Since then, the P-Q Centre's various co-ordinators have been responsible for overseeing the development of the Centre's services to the community and for co-ordinating and administering the affairs of the Centre, under the direction of the P-Q Centre's Board of Directors. The co-ordinators have functioned in the manner of a typical executive director of a non-profit agency. Indeed, the position has recently been retitled "Executive Director". Until recently, the person in that position has been a Region employee for administrative purposes and has maintained the requisite administrative links with the Region in that respect.

30. The individual co-ordinators have always wielded a significant amount of influence at the P-Q Centre. This is inherent in the position. However, the Board of Directors has not always followed a co-ordinator's lead or advice. On the other hand, the co-ordinator has always taken his/her lead from the Centre's Board of Directors and has operated within its mandate. The P-Q Centre has always had a rather well-developed agenda, and since the departure of the first co-ordinator it was clear that the co-ordinator was there to assist and carry out the directions of the P-Q Centre, and was not there as an instrument or representative of the Region or its policies. All co-

ordinators since the first one, have understood that their first obligation was to the P-Q Centre. The Region has also understood and accepted this.

31. The Region also accepted the Centre's overall supervisory role over other Region administrative employees at the Centre. While at the Centre, these other Region employees performed Centre work as part of the P-Q Centre's facilitating and co-ordinating role. The situation with these employees was not quite as clear as with the co-ordinator, particularly since their role with respect to Region programs run out of the P-Q Centre was not readily distinguishable from that of Region employees not located at the P-Q Centre.

32. Taken as a whole, the situation demonstrates a number of things. First, it shows that the Region recognized very early on that it had a supporting role which it accepted in part because of the P-Q Centre's insistence, and in part because it recognized that the independent community based model for delivery of social services was desirable even from its perspective. Second, it was inevitable that the Region's participation in the Centre would evolve to one of a more traditional funder (that is, the infusion of money only, rather than money and other resources) and collocated agency. Third, it shows that the P-Q Centre was not directed or controlled by the Region and that, notwithstanding the suggestions in some of the Region's documents, the P-Q Centre was an independent entity

33. Indeed, from the beginning, the P-Q Centre has struggled against the controls which others, including the Region, have imposed or sought to impose on it. The Centre has always had its own agenda which is, general terms, to identify community social service needs and to facilitate and co-ordinate the delivery of a comprehensive package of social services to meet those needs. In that respect, the various participating agencies, including the Region, while retaining the kind of control and expectations which any funder particularly a public funder, have submitted to the Centre's co-ordinating role and to the incorporation of their particular social services program(s) into the delivery network developed by the P-Q Centre, though not into the Centre as such. In the result, the various social service agencies, including the Region and the Children's Aid Society, are active participants in the P-Q Centre which both plays an overall co-ordinating role and provides complimentary and supplementary services. Consequently, the P-Q Centre is neither a mere collocation of existing social service agencies or programs, nor a mere extension of one or more of these agencies.

34. At present, the Centre receives funding from a variety of sources, including the Ministry of Health (approximately 49%), the Region (approximately 21%), the Ministry of Community and Social Services (approximately 24%), Employment and Immigration Canada (approximately 3%), the Children's Aid Society (approximately 2%), City of Ottawa (approximately 1%) and Health and Welfare Canada (approximately 1%). At the time this application was made, the P-Q Centre ran ten programs of its own:

- a) A nursery school program in its own name in which 48 spaces are 100% subsidized. The Region funds 90% and the Ministry of Community and Social Services funds 10%.
- b) A Settlement Language Program which is Federally funded and is offered in collaboration with the Ottawa Board of Education which provides the teachers to deliver the actual program.
- c) The Crescendo Program which has been operating since 1980. Funded by the Ministry of Community and Social Services, it is

designed to address the needs of low income isolated parents and care givers.

- d) Health and Welfare Canada funded a one year program designed to provide support victims of domestic violence (this program ended in July, 1991).
- e) The Community Development Program funded jointly by the City of Ottawa and the Region.
- f) A Primary Help Care Program funded by the Ministry of Health.
- g) A Crisis Intervention Program funded by the Ministry of Health.
- h) A Health Promotion Program funded by the Ministry of Health.
- i) A Mental Health Program funded by the Ministry of Health.
- j) A Minorities Outreach Program funded by the Ministry of Health.

There were also four collaborative programs running out of the centre.

- a) An ACT (Action for Careers and Training) program. This is an employment initiatives program operated by the Region.
- b) A Home Support Services program operated by the Region. It provides short-term home making services and home management counselling.
- c) The West End Team of the Children's Aid Society of Ottawa-Carleton has operated from the P-Q Centre since the Centre's inception.
- d) The west end office of Housing Help, a community based housing information service for needy persons.

In the past, other centres and collaborate programs have operated from the P-Q Centre including:

- a) Deja Vu, a job training and placement program for women developed by the Centre and funded by Employment and Immigration Canada (1983 to 1989).
- b) P-Q Ventures, a centre program directed at community owned and directed economic development which now operates separately from the Centre.
- c) The West End Legal Aid Clinic. Now independent of the Centre, it began as an Ontario Legal Aid Plan funded service of the Centre.
- d) The Youth Services Bureau provided a worker to help assess the needs of young people in the community (1989).
- e) Family Services Counsellors worked out of the P-Q Centre from the early 1980's to July 1990.

35. In our view, a review of the programs run out of this centre indicates several things. First, it shows that the Region has been an important contributor to the P-Q Centre but also that it is not the only one. Second, it shows that the P-Q Centre has developed and continues to develop its own social service programs and that it co-ordinates those programs with needed existing programs from other agencies. Third, the fact that the Region continues to operate its own programs out of the centre helps to explain why the name of the P-Q Centre appears on Region pamphlets and why it is listed in the telephone directory under the Region's Social Services Department, since the Region does itself deliver social services from the P-Q Centre. All of this also demonstrates that the P-Q Centre has not been either solely dependent on, or subordinate to the Region, and that the Region has not transferred any of its social service responsibilities to the Centre. The Region continues to deliver the social services it did before. The difference is that Region now delivers some of the services through the P-Q Centre as part of a co-ordinated delivery scheme.

36. In the result, we are not satisfied that the P-Q Centre and the Region operate an activity or business under common direction or control within the meaning of section 1(4) of the Act. Nor are we satisfied that the Region has "sold", within the meaning of section 64, any part of its "business" to the P-Q Centre.

37. We also find it appropriate to note that the mischief against which sections 1(4) and 64 of the Act are directed does not appear to us to be present in this case. No Region employees lost their jobs. Nor have any Region positions or employees been "transferred" to the P-Q Centre. What has occurred is that the Centre's positions previously staffed by what were nominally Region employees are now staffed by people who are in every way Centre employees. Although the positions which were previously located at the P-Q Centre are no longer there and in a sense no longer exist as Region positions, these were at best, temporary and artificial accretions to the applicant's bargaining unit and were not part of any natural bargaining unit growth or expansion. Further, to the extent that P-Q Centre employees are doing what was "bargaining unit work", the applicant's bargaining rights do not attach to it.

38. The application in Board File No. 3098-90-R is therefore dismissed.

1286-92-JD The Regional Municipality of Sudbury Pioneer Manor - Home for the Aged, Complainant v. Ontario Nurses' Association and Canadian Union of Public Employees, Local 148, Respondents

Jurisdictional Dispute - Board denying ONA's motion to defer consideration of jurisdictional dispute complaint pending disposition at arbitration of certain grievances - Board satisfied that matters in issue transcending collective agreement issue raised in ONA's grievances and having substantial and proximate jurisdictional dispute element and implications

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. A. Correll* and *B. L. Armstrong*.

APPEARANCES: *Walter Thornton and John Luszka for the complainant; E. McIntyre, Ralph Mills and Amanda Pask for Ontario Nurses' Association; and Nancy Rosenberg and Dennis Burke for Canadian Union of Public Employees, respondents.*

DECISION OF THE BOARD; November 13, 1992

1. This is a complaint concerning work assignment which has been brought to the Board under section 93 of the *Labour Relations Act*.

2. Upon hearing the representations of the parties at a hearing on November 6, 1992, the Board ruled, orally, that it has jurisdiction to inquire into this complaint, and that it is appropriate for the Board to proceed to do so. The Board therefore dismissed the motion by the respondent Ontario Nurses' Association (the "ONA") that the Board defer consideration of this complaint pending the disposition at arbitration of certain grievances filed by the ONA.

3. At issue in this complaint is the assignment by the complainant employer to members of the respondent Canadian Union of Public Employees, Local 148 (the "CUPE") of certain work which the respondent ONA has, in effect, asserted in a series of grievances should have been (and should be) assigned to its members. For purposes of the motion, it is sufficient to describe the work in issue as a bundle of nursing duties including certain types of data collection and charting, most drug administration, guidance to Practical Nurses employed by the complainant, and reporting to oncoming shifts and to the complainant's administration.

4. Counsel for the ONA argued that the real dispute is a bilateral one between it and the complainant with respect to the proper interpretation and application of the collective agreement between them. She submitted that there is no conflict between that collective agreement and the collective agreement between the complainant and the CUPE and that the best forum for resolving that dispute is arbitration. Counsel submitted that the jurisdictional dispute mechanism in section 93 of the Act was enacted primarily in response to the needs of the construction industry, which is quite different from the public sector and, more specifically, is not applicable to the dispute herein. She argued that only the grievance arbitration procedure which the ONA has engaged provides the appropriate contractual remedies, and that the absence of such remedies in the Board's jurisdictional dispute procedure will force the ONA to proceed with the arbitration of its grievances whatever the disposition of this complaint by the Board.

5. Counsel conceded that CUPE members would lose their jobs if the ONA succeeds at arbitration, but submitted that the interests of the CUPE and its members can be adequately covered by giving them notice of the arbitration proceedings and standing to participate in them.

6. The complainant and the CUPE both opposed the ONA's motion.

7. Subsection 93(1) of the *Labour Relations Act* provides that:

93.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

Together with the other subsections of section 93, it gives the Board broad powers with respect to disputes concerning the assignment of work. Although it is particularly well suited to such disputes in the construction industry, section 93 is patently not limited to that labour relations sector. Indeed, we did not understand counsel for the ONA to suggest that it was.

8. In the interests of labour relations stability, the Board has taken a broad approach to work assignment disputes such that, when it is satisfied that a complaint does relate to a true jurisdictional dispute, the Board will generally inquire into it. It is not uncommon for a grievance to raise an issue which is essentially or substantially a jurisdictional dispute. When a complaint under section 93 relates to the same assignment which is the subject of a grievance, the Board is often faced with deciding how to best proceed.

9. In this case, the complainant has assigned certain work to members of the CUPE which the ONA claims should have been assigned to its members. The CUPE claims that the work in dispute has been properly assigned. This is clearly a jurisdictional dispute, or complaint concerning work assignment, within the meaning of section 93 of the *Labour Relations Act*, which we were satisfied the Board has the jurisdiction to inquire into (and we note that Counsel for the ONA did not suggest that the Board was without jurisdiction).

10. The second question was, in essence, whether the Board is the best forum for resolving the dispute between the parties. The purpose of arbitration is to provide an expert and expeditious mechanism for resolving grievances with respect to the interpretation, administration or application of the particular collective agreement with respect to which the particular grievances have been brought. On the other hand, section 93 has been specifically designed to be the primary means by which jurisdictional dispute complaints are resolved. A board of arbitration undoubtedly has jurisdiction and the expertise to deal with alleged violations of a collective agreement and may even have remedial powers which the Board does not have in a jurisdictional complaint. However, the Board's jurisdictional dispute complaint jurisdiction and process is much broader, in terms of the parties involved, the scope of the inquiry and the range of remedies available, than the private arbitration process. Indeed, it includes consideration of the applicable collective agreement(s) and the parties' rights thereunder as well as the other relevant factors, the significance of any one of which varies from case to case depending on the circumstances of each case. The Board is certainly no stranger to the interpretation and application of collective agreements. Consequently, while there may be circumstances in which it is not appropriate to do so, the Board will generally be inclined to proceed with a complaint filed under section 93 of the Act, rather than allowing or requiring a grievance relating to the same assignment of work to proceed first.

11. In this case, we were satisfied that the matters in issue between the parties transcend the collective agreement issues raised in the ONA's grievances, and have a substantial and proximate jurisdictional element and implications. The fact that the proceedings before the Board *may* not be dispositive of the entire dispute between the parties or any two of them was not, in our view, a cogent reason not to proceed with this complaint.

12. Consequently, and notwithstanding the able submissions of counsel for the ONA, we dismissed the ONA's motion as aforesaid.

13. The complaint will therefore proceed as scheduled.

14. Of course, nothing in this decision precludes the ONA from seeking to proceed with the arbitration of its grievances. Those arbitration proceedings are outside of this Board's jurisdiction.

0856-92-U Ontario Public Service Employees Union, Complainant v. Royal Ottawa Health Care Groups/Services De Sante Royal Ottawa, Respondent

Change in Working Conditions - Hospital Labour Disputes Arbitration Act - Unfair Labour Practice - Board determining that, in the particular circumstances, employer's freezing of employees' anniversary increments not violating "statutory freeze" - complaint dismissed

BEFORE: Robert D. Howe, Vice-Chair, and Board Members D. A. MacDonald and C. McDonald.

APPEARANCES: Christopher Dassios and Ed Ogibowski for the complainant; Carole Piette, Ingo Ritums and Karen Iddon for the respondent.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER, D. A. MACDONALD; November 27, 1992

1. This is a complaint under section 91 of the *Labour Relations Act* in which the complainant (also referred to in this decision as the "Union") alleges that the respondent contravened section 81 of the Act by freezing employees' "anniversary increments".
2. The respondent operates the Royal Ottawa Hospital, a rehabilitation centre, and certain satellite operations in the Regional Municipality of Ottawa-Carleton. On February 14, 1992, the Union filed an application for certification (File No. 3662-91-R) in which it sought bargaining rights for all paramedical and technical employees of the respondent at the Royal Ottawa Hospital, save and except certain specified exclusions.
3. The respondent received notice of that application from the Board during the last week of February. In its reply dated February 28, 1992, the respondent proposed a substantially larger bargaining unit, including more than twice as many employees as the unit proposed by the Union.
4. The parties met with a Board Officer on March 12, 1992 in respect of the certification application. That meeting continued on May 26 and 27, 1992. The parties' dispute concerning the scope of the bargaining unit remained unresolved as of October 14, 1992, when the instant complaint came on for hearing before this panel of the Board.
5. The respondent's wage scales for its non-unionized employees specify minimum and maximum wage rates for various classifications, as well as the rates applicable at each of the steps along the scales. The rates specified on those scales are generally revised on an annual basis to reflect the cost of living increase granted by the respondent to its non-unionized employees. Some of the scales have also occasionally been compressed (to reduce the number of steps) or expanded (to increase the number of steps). All of the respondent's non-unionized employees who meet minimum performance criteria are generally advanced one step on the applicable wage scale each year on the anniversary of their respective dates of hire, until they attain the maximum rate for their classification. These wage scale advancements were referred to in the evidence (and are referred to in this decision) as "anniversary increments".
6. It is clear from the totality of the evidence that it has been the respondent's practice to treat all non-unionized employees alike in terms of cost of living allowance ("COLA") adjustments and anniversary increments (as described above) for at least the last eleven years. All such wage adjustments are, of course, dependent upon the respondent's ability to pay, as determined by

the cash flow adjustments which it receives from the various provincial ministries that provide the bulk its funding.

7. In preparing its budget policies and then its budget for the 1992/93 fiscal year, the respondent, through its Director of Finance and Human Resources, Ingo Ritums, and through its committee structure, took into account various public statements by the Premier and the Provincial Treasurer which led officials of the respondent to conclude that no further cash flow adjustments would be made available to hospitals for wage settlements. It also took into account the adverse effect which the Quebec Government's repatriation of non-resident hospital beds was having on its revenue base. Those considerations led the respondent to conclude that its existing restraint practices (which consisted of "slow hiring" and selected hiring freezes) would need to be revised.

8. After the 1992/93 budget policies were approved on October 31, 1991 by the respondent's Board of Trustees, those policies were used as a guide in developing its 1992/93 budget. By February 5, 1992, the need for fiscal restraint had prompted the respondent's Corporate Services Committee to formulate a budgetary recommendation that 1½ to 2% be allocated for 1992/93 COLA for non-unionized employees, that their movement through the salary scales be frozen for that year, and that a discretionary amount be set aside for adjustments and one-time payments in recognition of exceptional middle management performance. Since some recent union awards had compressed the salary differentials between certain unionized employees and their non-unionized supervisors, those adjustments were necessary to maintain the respondent's policy of paying supervisors at least five per cent more than the employees they supervise.

9. By the time of the February 19, 1992 meeting of the Corporate Services Committee, the aforementioned recommendation had come to be described more specifically in the following terms: "that the anniversary increase for non-union be frozen, effective April 1/92 and that a package of 2.5%, with .75% for adjustments be adopted." After that recommendation had been considered by the respondent's Administrative Committee and had thereby become a recommendation of that committee, it was approved by the respondent's Board of Trustees on May 28, 1992. The evidence indicates that the percentage set aside for salary compression adjustments, and for one-time payments to individuals in middle management for exceptional performance as determined on a case by case basis, was the same as in previous years.

10. Employees were informed of that 1992/93 salary program by means of the following memorandum:

PLEASE POST OR CIRCULATE

MEMORANDUM

TO: Discipline/Service Directors
Supervisors

FROM: Ingo Ritums
Director, Finance and Human Resources

DATE: June 8, 1992

SUBJECT: 1992/93 Salary Program

On May 28, 1992 the Board of Trustees approved the proposed 1992/93 salary program for non-union staff, non-management and management levels.

1. Effective April 1, 1992 a cost of living increase of 1.5% which will result in an adjustment of 1.5% to existing salary scales.
2. Effective June 1, 1992, for a one year inclusive period, a freeze on anniversary increments.

Human Resources and Finance will be working closely to put the 1992/93 salary program into place.

- COLA adjustments will be reflected on your July 17, 1992 payroll deposit.
- Retro adjustments will be added to the July 31, 1992 payroll deposit.

Please communicate the above information to your respective staff members.

Yours truly,

“I. Ritums”

Ingo Ritums

Director, Finance and Human Resources

The respondent neither requested nor obtained the Union's consent in respect of that freeze on anniversary increments.

11. It is the complainant's position that the respondent contravened section 81(2) of the Act by imposing the aforementioned anniversary increments freeze on the employees for whom it seeks bargaining rights, without its consent. The respondent submits that by freezing the anniversary increments of the employees potentially affected by the Union's application for certification, it was maintaining its long-standing practice of granting similar COLA increases and anniversary increments (based upon progression through the applicable wage scales) to all its non-unionized employees. Thus, respondent's counsel submits that it would have been a contravention of section 81(2) for her client to have granted anniversary increments to the employees potentially affected by the Union's certification application when it did not grant such increments to its other non-unionized employees. Alternatively, respondent's counsel contends that if freezing anniversary increments does involve an alteration of the previous pattern, it is an alteration that falls within the reasonable expectations of the employees in the context of the financial constraints under which the respondent has to operate during its 1992/93 fiscal year.

12. Section 81(2) of the Act provides:

Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

13. In describing the purpose of the “freeze” period imposed by section 81(2), and of the subsequent freeze imposed by section 81(1), the Board wrote as follows in *Carleton University*, [1978] OLRB Rep. Feb. 184:

14. ... Through the combined operation of section 70(1) [now section 81(1)] and section 70(2) [now section 81(2)] of the Act, the Act imposes a continuous freeze on working conditions from the time the employer receives notice of an application for certification through the giving of notice under section 13 [now section 14] or section 45 [now section 54] and until either certain specified events occur after the Minister's appointment of a conciliation officer or mediator under the Act or until the right of a trade union to represent the employees has been terminated. With respect to the freeze imposed by section 70(1) following the giving of notice to bargain under either section 13 or section 45 of the Act, the Board has consistently stated that the purpose of the freeze period at this time is to maintain the status quo of the wages and other terms and conditions of employment so that the union is given an opportunity to enter negotiations and bargain for a collective agreement from a fixed point of departure and in an atmosphere of industrial relations security that is undisturbed by alterations in conditions of employment (see the Board's decisions in *Canron Ltd., Eastern Structural Division*, [1976] OLRB Rep. Aug. 436, *Industrial Wire & Cable Company*, [1977] OLRB Rep. June 385, and *Kodak Company Limited*, [1977] OLRB Rep. Feb. 49). In a similar vein the Board has stated that the purpose of the freeze in section 70(2) following the application for certification is to provide a period of some stabilization and tranquillity during which the union may seek to obtain bargaining rights on behalf of the employees in the absence of disturbances emanating from alterations in conditions of employment between the employees and the employer (see *Kodak Canada Limited*, *supra*, *Beaver Electronics Limited*, [1974] OLRB Rep. Mar. 120, and *Molson Brewery*, [1977] OLRB Rep. Aug. 526).

14. As indicated by the Board in *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795, at paragraph 9, section 81(2) "manifests a legislative intent to maintain the prior pattern of the employment relationship in its entirety". This "business as before" approach was articulated and applied in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, in which the Board wrote, in part, as follows:

23. The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

See also *Homewood Sanitarium of Guelph*, [1982] OLRB Rep. Feb. 230; *Ottawa General Hospital*, [1981] OLRB Rep. Oct. 1461; and *Public Service Alliance of Canada*, [1978] OLRB Rep. Sept. 854.

15. The Board has also developed a "reasonable expectations" test in respect of the freeze provisions. Although similar language had appeared in earlier decisions, the first complete articulation of that test is found in *Simpsons Limited*, [1985] OLRB Rep. Apr. 594:

23. That section 79 [now section 81] is intended to maintain the status quo, to provide a period of stability while the parties are establishing their collective bargaining relationship or renewing that relationship by negotiating another collective agreement, is a sentiment often affirmed by the Board. The classic exposition of the parameters imposed on employer conduct during the freeze is the business as before formula in *Spar Aerospace*, *supra*. That formula has been referred to in virtually every case which since has considered section 79. The cases also confirm that section 79 is a strict liability provision in that anti-union animus is not a relevant factor.

24. The interpretation of section 79 in the context of particular fact situations, however, has seldom proven simple or straightforward. The Board in *Simpsons*, *supra*, referred to a passage in

Sunnycrest Nursing Home Limited, [1982] OLRB Rep. Feb. 261 which it is appropriate to repeat here:

The freeze provisions give rise to difficult problems of interpretation for if treated as a total prohibition on any employer actions taken in the ordinary course of business which impinged upon the employment relationship, the freeze would effectively paralyze the employer's operations during the bargaining process; while, if the pre-existing but now frozen entrepreneurial rights are given too broad an interpretation, they would render the section meaningless.

• • • • •

28. The Board could have interpreted section 79 so as to freeze the precise conditions extant at the time the statutory provision was triggered. The Board, though, has consistently rejected that approach as an unreasonable interpretation of the legislation. In the Board's view, such an interpretation would effectively paralyze an employer's operations for the duration of the statutory freeze, a period which could be quite lengthy. In effect, the business as before formulation in *Spar Aerospace*, *supra*, was the Board's response to too expansive a view of employee privileges. To paraphrase *Spar Aerospace*, the employer's right to manage its operation was maintained subject to the condition that the operation conform to the pattern established when the freeze was triggered.

29. Business as before is a slippery concept to apply to specific fact situations. The focus of the test is the pattern of operations, the employer's practice. Certainly, where the practice is accurately embodied in an employer's policy manual, the application of business as before has been relatively straightforward: *J. M. Schneider Inc.*, [1984] OLRB Rep. Apr. 609. There have been other instances where a practice has been so well entrenched as to be beyond dispute: *Spar Aerospace*, *supra*, with respect to annual merit and annual cost of living increases. On the other hand, the increased parking fee cases illustrate the difficulty in looking for a pattern: see *Oshawa General Hospital*, [1985] OLRB Rep. Jan. 98, and the cases cited therein, including *Humber Memorial Hospital*, [1979] OLRB Rep. Aug. 764 and *Ottawa General Hospital*, September 1984, unreported, File No. 0965-84-U(B). Does business as before require annual adjustments to parking fees, equal increases in fees, regular adjustments, any charge to employees for parking, or, is what is frozen the actual rate in place at the time of the freeze? The cases generally reject the actual rate at the time for the freeze and uphold adjustments to rates. However, the cases reveal the difficulty of looking at a pattern or business as before to measure employees' privileges.

30. The freeze provisions catch two categories of events. There are those changes which can be measured against a pattern (however difficult to define) and the specific history of that employer's operation is relevant to assess the impact of the freeze. There are also first time events and it is with respect to that category that the business as before formulation is not always helpful in measuring the scope of employees' privileges. Some first time events have been readily rejected by the Board, where, for example, the employer has instituted parking fees for the first time during the freeze: see *Scarborough Centenary Hospital*, [1978] OLRB Rep. July 679; *St. Joseph's Hospital*, September 1984, unreported, File No. 0965-84-U(A). On the other hand, the Board has upheld an employer's right to lay-off employees during the freeze (assuming there is no anti-union animus in the decision): *Simpsons*, *supra*; *Burlington Carpet Mills*, *supra*; *The Winchester Press*, *supra*; *Grey Owen Sound*, *supra*; *Deacon Brothers*, *supra*; *Airline (Malton) Credit Union*, *supra*. This right has been confirmed even where the first instance of layoff occurred during the freeze (see *Grey Owen Sound*, *supra*; *The Winchester Press*, *supra*; and where the layoffs had occurred elsewhere in the employer's operation but not at the specific location in question (see *Simpsons*, *supra*)....

31. Instead of concentrating on business as before, the Board considers it appropriate to assess the privileges of employees which are frozen under the statute and thereby, delimit the otherwise unrestricted rights of the employer, by focusing on the reasonable expectations of employees. The reasonable expectations approach, in the Board's opinion, responds to both categories of events caught by the freeze, integrates the Board's jurisprudence and provides the appropriate balance between employer's rights and employees' privileges in the context of the legislative provisions.

32. Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. See, for example, *Corporation of the Town of Petrolia, supra*; *Scarborough Centenary Hospital, supra*; *Oshawa General Hospital, York-Finch Hospital, supra*; *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); *AES Data Limited*, [1979] OLRB Rep. May 368. In the latter case, for example, the Board found that the employer was entitled to re-assign job functions since the employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. Thus, in the Board's view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instant case, the Board is expressly articulating the test.

33. The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The reasonable expectations test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur everyday. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would reasonably expect such an occurrence during the freeze. The Board in *Simpsons, supra*, although the cleaning was contracted out before the company itself took over that operation, did not conclude there was such a pattern.

34. The reasonable expectations approach also integrates those cases which affirm the right of the employer to implement programmes during the freeze where such programs have been adopted prior to the freeze and communicated (expressly or implicitly) to the employees prior to the onset of the freeze....

35. Finally, the lay-off cases are consonant with the reasonable expectations approach. Very few, if any, work forces are entirely static; fluctuations in the size of the staff complement and its composition are the norm. Employers are generally expected to respond to changing economic conditions through the hiring, termination and attrition of employees. It is in this sense that it is reasonable for employees to expect an employer to respond to a significant downturn in the business with layoffs (or terminations) even where such layoffs are resorted to for the first time during the freeze....

16. In describing the effect of the freeze provisions contained in section 81 of the *Labour Relations Act* and section 13 of the *Hospital Labour Disputes Arbitration Act*, the Board wrote as follows in the recent case of *George St. L. McCall Chronic Care Wing of the Queensway General Hospital*, [1991] OLRB Rep. May 619:

12. ... section 13 of the HLDAA and 79 of the LRA operate together to prohibit an employer to which the HLDAA applies ... from altering working conditions (which include all terms and conditions of employment, including wages) in the circumstances set out therein. These are what are commonly known as "freeze" provisions. The purpose of these provisions is to provide a fixed and stable point of departure for collective bargaining, and to thereby facilitate the collective bargaining process, by maintaining the terms and conditions of employment for bargaining unit employees in the pattern which existed at the time the freeze provisions came into effect. This ensures a fixed basis for negotiations and precludes any unilateral alteration to the *status quo* which might give one party an unfair advantage in bargaining or for propaganda purposes.

13. Although the "freeze" label has stuck, it is a bit of a misnomer. Sections 13 and 79 of the HLDAA and the LRA respectively do not necessarily contemplate a static situation. As the Board's jurisprudence demonstrates, it is the pattern that existed prior to the onset of the freeze and the reasonable expectations of employees which are preserved, not merely the terms and conditions of employment in effect at the point in time that the freeze provisions come into effect. As such, section 13 of the HLDAA and section 79 of the LRA are strict liability provisions in the sense that an employer's actions need not be necessarily improperly motivated for it

to be in breach of them (see *Beaver Electronics Ltd.* [1974] OLRB Rep. Mar. 120, *The Wellesley Hospital* [1976] OLRB Rep. July 364, *Kodak Canada Ltd.* [1977] OLRB Rep. Aug. 517).

14. The Board has interpreted the freeze provisions in a manner which recognizes an employer's right to continue to manage its operations in accordance with a pattern which has been established prior to the freeze being triggered. This "business as before" approach was articulated and applied in *Spar Aerospace Products Limited* [1978] OLRB Rep. Sept. 859. As subsequent cases demonstrate, it is not always easy to apply this test. Nor does applying it always lead to an obvious result. In that respect, for example, the Board has found that the freeze provisions do not prohibit first time events (see *Grey Owen Sound Joint Homes for the Aged* [1983] OLRB Rep. Apr. 522 where lay-offs occurred for the first time during the freeze; *Corporation of the Town of Petrolia* [1981] OLRB Rep. Mar. 261 where work was contracted out for the first time during the freeze). To clarify the business as before approach, and to accommodate first time events, the Board developed the "reasonable expectations" test....

(See also *Harrowood Seniors' Community*, [1992] OLRB Rep. Feb. 177.)

17. In the instant case, the pattern frozen by section 81(2) is the respondent's long-standing practice of treating all its non-unionized employees alike in terms of COLA and anniversary increments. Thus, the respondent would have contravened section 81(2) if it had denied anniversary increments to the employees potentially affected by the Union's certification application while granting such increments to its other non-unionized employees. It would also have contravened section 81(2) if it had adopted the converse approach by granting anniversary increments to the employees potentially affected by the certification application while denying them to its other non-unionized employees. However, in responding to the aforementioned economic constraints by granting all of its non-unionized employees a COLA increase and freezing their anniversary increments for a one-year period, it was maintaining its established pattern of treating all its non-unionized employees alike in respect of COLA increases and anniversary increments. We are also satisfied on the totality of the evidence that the respondent was carrying on "business as before" in setting aside the aforementioned percentage for salary compression adjustments, and for one-time payments to individuals in middle management for exceptional performance as determined on a case by case basis. In this regard, we respectfully disagree with our dissenting colleague's view that the latter payments are "anniversary increments" (as described in paragraph 5 of this decision). Moreover, just as it is reasonable for employees to expect an employer to respond to significant reductions in funding by laying off employees, so too is it reasonable for employees to expect an employer to react to the non-availability of funding increases by declining to grant some or all forms of wage increases, including anniversary increments. Thus, whether viewed from the perspective of maintaining the existing pattern in accordance with the "business as before" approach, or from the perspective of what reasonable employees would expect to constitute their privileges or benefits in the specific circumstances of their employer, the respondent's freezing of anniversary increments was not violative of section 81(2) in the circumstances of this case.

18. For the foregoing reasons, the complaint is hereby dismissed.

DECISION OF BOARD MEMBER C. MCDONALD; November 27, 1992

1. I have read the majority decision and with the greatest respect I believe that they are wrong and I dissent from that majority decision.

2. The Minutes of the January 22, 1992 meeting of the Corporate Services Committee state:

3.4 Non Union Salary Admin. Policies 92/93 - Approach: ... noted I. Ritums "that we will go with the steps, but anything else will have to await the pay equity ruling".

3. In evidence Mr. Ritums could not recall what he meant by “go with the steps”.

4. The Minutes of the February 5, 1992 Meeting of the Corporate Services Committee state:

3.4 Salary Admin. Policy 92/93 ... it was agreed that there is a need for some COLA, which could be 1½% or 2%; that the movement through the salary scales will be frozen for the current year; that we look at a discretionary amount to be set aside for adjustments and for one-time payments in recognition of exceptional performance, as judged by senior management in their review of middle management performance, and that the pay equity issue would be a separate issue ...

5. The Minutes of the February 19, 1992 Meeting of the Corporate Services Committee state:

2.5 Salary Admin. Policy 92/93 ... I. Ritums reported that the last meeting of Corporate Services had recommended that the anniversary increase for non-union be frozen, effective April 1, 1992 and that a total package of 2.5%, with, .75% for adjustments be adopted. \$180,000 has been put in the budget for this purpose.

6. The Minutes of the May 28, 1992 Meeting of the Board of Trustees state:

... it is now recommended that the Hospital proceed with the following salary policy for fiscal 1992-93:

- a cost of living of 1.5% effective April 1, 1992;

- 180,000 set aside for performance payments on a case by case basis (as determined by administration) and for salary compressions;

- a freeze on movement through the salary scale for a 12-month period effective June 1, 1992;

... salary compression relates to the differential between supervisors and the staff reporting to the supervisor ...

... the 180,000 includes not only the adjustments required for salary compression, but also a pay-for-performance plan for *management staff that allows for a graduated payment for performance. This process includes an annual performance appraisal by the department head which results in a performance rating which is then reviewed by senior management.* [my emphasis]

7. Employees were informed of the 1992/93 salary program by means of the memo reproduced at paragraph 10 of the majority decision. The memo did not advise the employees of the entire salary policy for fiscal 1992/93 as outlined above in paragraph 6.

8. At paragraph 17 of the majority decision it states:

“in the instant case, the pattern frozen by section 81(2) is the respondent’s long-standing practice of treating all its non-unionized employees alike in terms of COLA and anniversary increments. Thus the respondent would have contravened section 81(2) if it had denied anniversary increments to the employees potentially affected by the union’s certification application while granting such increments to other non-unionized employees... However, in responding to the aforementioned economic constraints by granting all of its non-unionized employees a COLA increase and freezing their anniversary increments for a one year period, it was maintaining its established pattern of treating all its non-unionized employees alike in respect of COLA increases and anniversary increments”.

9. The respondent in its minutes of the Board of Trustees Meeting of May 28, 1992 approved the salary policy for 1992/93 granting annual performance appraisals and merit increases

as it had in the past for some of its employees while denying annual increments to the employees the union is seeking to represent. Adopting the majority view would find that the respondent's freezing of some of the employees' anniversary increments to be violative of section 81(2).

10. Unlike the majority I do not believe that the pattern frozen by section 81(2) is the respondent's long standing practice of treating all its non-unionized employees alike in terms of COLA and anniversary increments.

11. The pattern that should be frozen by section 81(2) is the respondent's regular and consistent practice for the last 11 years of granting anniversary increments to each employee, each year effective on the anniversary date of employment.

12. Respondent's counsel contends that if freezing anniversary increments does involve an alteration of the previous pattern, it is an alteration that falls within the reasonable expectations of the employees in the context of the financial constraints under which the respondent has to operate during its 1992/93 fiscal year.

13. The reasonable expectations of the employees would be that after 11 years of receiving anniversary increments they could reasonably expect the practice to continue (as it had for the management employees).

14. The respondent did not advise or communicate its decision to freeze the wages of its employees until the memo of June 8, 1992.

15. The anniversary increase, in my view, is an established benefit for all employees that should be preserved by section 81(2). The evidence discloses that the proposed salary policy had changed during the months preceding the Board of Trustees final approval on May 28, 1992.

16. Although the total amount was set the respondent could have exercised its discretion to distribute those funds budgeted for salary increases in a manner that would have been consistent with its past practice.

17. The respondent's right to manage would have been maintained while at the same time preserving the pattern established before the circumstances giving rise to the freeze occurred.

18. The chilling effect that the withdrawal of the expected wage increase has upon the representation of employees by the trade union will be a difficult hurdle for the union to overcome.

19. The unfortunate message that reasonable employees will derive from the majority decision is that "if you join a union you will lose your anniversary increase and possibly any other future benefits, so don't join a union".

20. It is my view that this gives the respondent an unfair advantage in bargaining or for propaganda purposes.

The employees have been intimidated and will accept less out of fear of further reprisal.

21. The majority decision at paragraph 17, states:

... "whether viewed from the perspective of maintaining the existing pattern in accordance with the 'business as before.' approach or from the perspective of what reasonable employees would expect to constitute their privileges or benefits in the specific circumstances of their employer ...".

22. However unlike the majority I would conclude the paragraph by stating the respondent's freezing of anniversary increments was violative of section 81(2) in the circumstances of this case.

23. I would have granted the relief sought by the union.

2702-90-G United Brotherhood of Carpenters and Joiners of America, Local 1988, Applicant v. Shell Canada Limited, Respondent

Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Employer - Board determining that Carpenters' union had not abandoned its bargaining rights in the ICI sector prior to March 1978 - Board adopting and applying *Metro Toronto #2* case and rejecting argument that respondent was acting in capacity of owner and purchaser of construction services and not as employer in the construction industry

BEFORE: *N. B. Satterfield, Vice-Chair, and Board Members D. A. MacDonald and J. Redshaw.*

APPEARANCES: *Harold Caley, Cindy Watson and Gary Rees for the applicant; Joseph Liberman and Glenn Pickell for the respondent.*

DECISION OF THE BOARD; November 30, 1992

1. This referral of a grievance in the construction industry for final and binding arbitration was made under section 124 [now section 126] of the *Labour Relations Act* on January 16, 1991. The grievance alleges that Shell Canada Limited ("Shell") violated the subcontracting provisions (Article 4) of the Provincial Collective Agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America effective from May 1, 1990 to April 30, 1992 on Shell's "Project Excel" in Brockville, Ontario. When these matters came before the Board for hearing on March 20 and 21, 1991, counsel for Shell raised two defences to the grievance.

2. Its primary defence was that Shell was not bound to the 1990-92 Carpenters Provincial Collective Agreement because Local 1669, an affiliated bargaining agent of the carpenters designated employee bargaining agency had abandoned its bargaining rights for carpenters and carpenters' apprentices employed by Shell prior to September 6, 1978, the effective date of the first Carpenters Provincial Collective Agreement. In the alternative, if Local 1669 did not abandon its bargaining rights as aforesaid, Shell contends that it was not bound by the 1990-92 Carpenters Provincial Collective Agreement respecting Project Excel because it was the owner or purchaser of construction with respect to the project and, therefore, was not an employer within the meaning of the construction part of the Act with regard to the project.

3. During the two days of hearing, the Board heard the *viva voce* evidence of Gaetan Roy and John McMahon. Roy is Shell's project manager for Project Excel. McMahon is employed by Kilborn Inc. as a project manager and was responsible for the execution of its duties respecting Project Excel. Kilborn was under contract to Shell as construction manager for Project Excel. Their *viva voce* evidence and the documentary evidence admitted through them or on agreement of the parties related primarily to Shell's alternative defence.

4. The Board set June 26 and 27, 1991 and August 27 and 28, 1991 for continuation of hearing into these matters. The June dates were subsequently adjourned at the request of the parties and the August dates were adjourned because of the illness of a member of the Board panel. The application was brought back on for hearing on August 13 and 14, 1992. At the hearing on these dates, the Board accepted the agreement of the parties that each would stipulate the remaining facts on which it would be relying, particularly regarding the issue of abandonment of bargaining rights, and make legal arguments respecting both issues based on those facts and on the *viva voce* and documentary evidence admitted during the first two days of hearing.

5. Project Excel involved the construction of a \$70 million lubricant blending and packaging plant, including a very large warehouse, filling and packaging building with attached office building, a tank farm for above-ground storage of base oil, additives and finished product, and areas where rail tank cars and highway tank trucks are filled. Shell engaged Mid-America Design Engineering to design the project and Kilborn, as construction manager, to procure all materials and equipment and to construct the project.

6. The applicant's claim that Shell is bound to the 1990-92 Carpenters Provincial Collective Agreement relies on a Board certificate issued to Local 1669 of the United Brotherhood of Carpenters and Joiners of America ("Local 1669") on August 2, 1967 as exclusive bargaining agent for carpenters and carpenters' apprentices employed by Shell in the District of Thunder Bay. Local 1669 and Shell executed an agreement effective August 8, 1967 binding Shell to the collective agreement then in existence between the Lakehead Builders' Exchange and Local 1669 ("the Exchange Agreement"). The full text of their agreement reads as follows:

WHEREAS: The Union and the Lakehead Builders' Exchange negotiate and establish by agreement certain terms and conditions of employment,

and

WHEREAS: The parties hereto desire to promote and maintain harmonious relations between the Employer and Employees:

WITNESSETH: That the parties hereto accept and agree each with the other to be bound by all terms and conditions contained in the current agreement between the Union and the Lakehead Builders' Exchange, and as it may be changed or renewed from time to time by negotiations and/or by lapse of time, to the same extent as though the Contractor has executed such agreement as a member of the Lakehead Builders' Exchange and such terms and conditions are hereby made part of this agreement and effective on all projects of the Contractor in the geographical Districts of Rainy River, Kenora, Thunder Bay and that part of the District of Algoma and Cochrane, north of the 49th Parallel and west of the North Driftwood, Abitibi and Moose Rivers to the James Bay including the rivers herein named.

7. Clause 24.01 of the Exchange Agreement provided for it to operate from June 10, 1966 to March 31, 1968. Clause 24.02 set the following terms for the giving of notice to bargain and for renewal of the agreement if neither party gave notice to bargain:

24.02 Should the Exchange or the Union desire to change, add to or amend this Agreement, each agrees to give to the other, written notice to the effect on or before the thirtieth day of November, 1967, or 120 days prior to the termination date of this Agreement. All changes are to be specified at this time. Provided that no such notice is given, this Agreement shall remain in effect from year to year. No additions, amendments or changes are to take place prior to the date of termination as specified except as may be mutually agreed upon by the Union and the Exchange.

It is undisputed that the Exchange (and later its successor, the General Contractors Section of The Construction Association of Thunder Bay Incorporated) and Local 1669 negotiated successor collective agreements which were in effect during the following terms:

March 21, 1968 to March 31, 1970;
June 1, 1970 to April 30, 1973;
July 1, 1973 to April 30, 1975;
July 21, 1975 to April 30, 1977;
July 16, 1977 to April 30, 1978.

8. Article 21 - Work Subcontracted of the first Exchange Agreement provided as follows:

21.01 all work of the Carpenters and Joiners, as defined in Article 4 of this Agreement, performed on the job site of the Employer, sub-contracted in any form, shall be subject to this Agreement.

There is no evidence that the substance of that clause was amended in any of the subsequent agreements between the Exchange and Local 1669.

9. The evidence is uncontradicted that, from August 8, 1967 to April 30, 1978, Shell had large and small construction projects within the geographic jurisdiction of the Exchange Agreement and its successor agreements listed above, about which Local 1669 was aware or, with due diligence, ought to have been aware. The projects involved work traditionally performed by the carpenter trade and claimed to be the work of carpenters under those agreements. Shell did not employ any construction tradesmen, including carpenters, on those projects, or act as its own general contractor. Instead, it engaged both union and non-union general contractors or specialty trade contractors, or construction managers or project managers to perform the construction.

10. On February 21, 1969 the union complained in writing to Shell about its use of non-union contractors for construction of a bulk plant in Emo, Ontario. The union notified Shell by letter dated March 20, 1969 that it was referring a grievance to arbitration about Shell's use of those contractors, appointed its nominee to an arbitration board and requested Shell to appoint its nominee. On March 21, 1969, Local 1669 received a letter dated March 19th from Shell in which Shell took the position that it was not bound by the Agreement "... in situations where the work is not performed by the owner (Shell) but by a contractor". The letter went on to state:

The work being done at Emo, Ontario referred to in your letter is not performed by Shell or its employees nor is the work sub-contracted by Shell, but is being performed by a contractor who has in turn sub-contracted some of the work. Accordingly, we cannot agree with the premises which are the basis of your letters.

Shell advised the union by telegram dated March 25, 1969 of the name of its nominee to the arbitration board. On April 3, 1969 the union advised Shell in writing that it was withdrawing its request for arbitration of its grievance about the work contracted by Shell on the construction of the bulk plant. Local 1669 did not file any other grievance against Shell up to April 30, 1978, when, by operation of what is now section 147(2) of the Act, the Exchange Agreement ceased to operate with respect to carpenters employed in the ICI sector of the construction industry for whom Local 1669 held bargaining rights in that sector.

11. Local 1669 was the respondent trade union to an application for accreditation made by The Construction Association of Thunder Bay Incorporated on May 15, 1973. The Association was seeking to represent in collective bargaining those employers with whom Local 1669 was entitled to bargain in the industrial, commercial and institutional sector, the sewers, tunnels and watermain sector and the heavy engineering sector of the construction industry in the same geographic area to

which the Association's collective agreement with Local 1669 applied. Local 1669 named Shell as an employer with whom it was entitled to bargain as at May 15, 1973. Shell made an employer filing respecting the same application. That document bears the date July 30, 1973. In making its filing, Shell did not deny that Local 1669 was entitled to bargain on behalf of Shell's employees. The Association's application for accreditation was dismissed on October 16, 1973.

12. By letter dated March 6, 1978, Local 1669 served the following notice on Shell and other employers for whose employees it claimed bargaining rights:

Please be advised that the agreement that we now hold with your Company will cease to operate on the 30th April 1978.

We are negotiating a Provincial Agreement for the Industrial Commercial and Institutional Sectors which may affect your company.

At the same time, Local 1669 also advised the carpenters designated employee bargaining agency that it claimed bargaining rights for Shell's carpenters and apprentices.

13. The first Carpenters Provincial Collective Agreement in the industrial, commercial and institutional sector of the construction industry became effective September 6, 1978 and, by statute expired April 30, 1980. Successive renewals were negotiated biennially until May 1, 1990, the effective date of the Carpenters Provincial Collective Agreement under which this grievance was made. Clause 4.01 of Article 4 - Subcontracting of each of those agreements placed limits on an employer bound by them when letting contracts for work claimed by the union under the agreements. Before the 1982-84 agreement, Clause 4.01 provided that work covered by the provincial agreement "... only be sub-contracted to an Employer bound by this Agreement." The 1982-84 Carpenters Provincial Collective Agreement was amended by adding the words "contracted or" to the clause to provide that such work "... only be contracted or sub-contracted to an Employer bound by this Agreement".

14. During the entire period from at least April 1969 when Local 1669 withdrew its arbitration request until the filing of this grievance, Shell completed many large and small construction projects throughout Ontario involving work of the carpenter trade. The jobs were performed for Shell by general contractors, specialty trade contractors, construction managers and project managers selected under Shell's open tender policy. The projects were divided approximately equally between union and non-union contractors. Shell did not employ directly any construction trades on these projects. Approximately 15 of the jobs performed within Local 1669's geographic jurisdiction prior to April 30, 1978 were performed by non-union contractors. Approximately 130 of the jobs, totalling millions of dollars, were performed between that date and the making of this grievance throughout the province by non-union contractors, including a large one in Mississauga, on which both union and non-union trades were employed.

15. Neither Local 1669 nor any other affiliated bargaining agent of the carpenters designated employee bargaining agency filed any grievance against Shell respecting those projects until the instant one.

16. At no time since 1969 was Shell ever served with a notice to bargain by Local 1669 or any of its affiliates, nor has Shell ever bargained subsequent to 1969 with the United Brotherhood of Carpenters and Joiners of America or any of its local affiliates, nor received from the Minister of Labour any "no board" letter.

17. Shell entered into an agreement with Kilborn on or about March 13, 1990 to procure all equipment and material for, and to construct Project Excel. The agreement is between Shell

Canada Products Limited and Kilborn Inc. It is styled an "Agreement for the Construction of Shell's Brockville Lubricant Manufacturing Plant". For ease of reference, the Board will call it "the Agreement". It made Kilborn responsible for construction management services and for the procurement of all process equipment and construction material for the project, including tanks and piping. The Agreement is for cost plus fixed fee; that is, Shell pays Kilborn the actual cost of procurement and construction, and a fixed fee for its services.

18. The applicant Local Union 1988 of the United Brotherhood of Carpenters and Joiners of America filed the grievance referred herein with Shell by letter October 29, 1990 alleging that Shell had violated the provisions of Clause 4.01 of the 1990-92 Carpenters Provincial Collective Agreement.

19. In keeping with its responsibility for procurement and the provision of construction management services to Shell, Kilborn brought its own policies and procedures respecting such things as procurement, safety and health and alcohol and drug abuse. However, in order to fulfil its obligations under the agreement, Kilborn expanded its own policies and procedures to include certain policies and procedures of Shell. For example, Kilborn's procurement policies and procedures were expanded to incorporate Shell's vendor quality program which includes standards for the selection of vendors and procedures to be followed in the procurement of equipment. Kilborn was required also to submit its safety and health policies and procedures and its alcohol and drug abuse policies to Shell for its approval and, where necessary, these policies and procedures were amended to include terms and conditions from Shell's policies and procedures. The agreement made Kilborn responsible for assuring strict compliance by subcontractors and their employees with Shell's policies and procedures. For that purpose, Shell required that the bid packages which Kilborn sent to potential subcontractors contain conditions which required the subcontractors and their employees to comply strictly with the policies and procedures respecting safety and health and alcohol and drug abuse.

20. Kilborn did not employ directly any construction trades on the project, rather it subcontracted all of the work of constructing the project. It did this by organizing the work into suitable packages and, based on the content of each package, identified contractors whom it knew to have the capacity to perform the work and, in this way, established a list of potential contractors for each package. These contractors received from Kilborn a "Request for Proposal" the request for proposal was an invitation to bid on a particular package of work and included a complete set of the contract documents, including a pro forma contract, drawings and specifications. At the outset of the project, Kilborn had submitted to Shell for its approval a complete set of the documents it would be using for the Request for Proposal. Contractors returned their Request for Proposal documents to Kilborn sealed. After tenders closed, Kilborn evaluated the bids and developed a short list of two or three bidders. It met with those contractors individually, evaluated the technical and cost elements of their bids and selected the successful bidder.

21. Kilborn then provided Shell with a bid tabulation containing information on such things as the cost of the work, the schedule for its performance and information on the subcontractor's project team, along with Kilborn's recommendation that Shell accept the bid. The terms of the Agreement allowed for Shell to accept or reject the bid. Before Kilborn actually awards a contract, and without letting the successful bidder know that it is going to get the contract, Kilborn met with the contractor to clarify and confirm the terms of contract. Shell can be represented at these pre-award meetings and was represented at separate pre-award meetings with each of four mechanical contractors.

22. Kilborn relied on a variety of other on-site meetings in the course of managing the

project. A site safety committee comprised of all contractors on the project met weekly and conducted safety audits of the project. Jean-Paul Boisclair, Shell's construction foreman on the project, was a member of the committee. Kilborn also had weekly progress review meetings with the contractors working on site and its construction manager met regularly with the site superintendents of the contractors. Kilborn also met from time to time with all of its staff on-site. Shell was not excluded from any of these meetings and occasionally attended Kilborn's staff meetings. Boisclair attended Kilborn's progress review meetings with subcontractors.

23. In the early stages of the project, Kilborn had 15 employees on-site under the supervision of its construction manager who is also located on-site. Kilborn did not employ directly any employees in the construction trades. Shell also had three employees on-site, Roy, Boisclair and Susan Lounsbury, senior project engineer. They were located on-site in the same office trailer complex where Kilborn's employees were located. Roy, Lounsbury and Boisclair were there to represent Shell's interests under the Agreement.

24. Kilborn was responsible for supervising all of the contracts which it let for the construction work, the scheduling of when contractors were to be on site to perform their work and overseeing their work on a daily basis. Kilborn also reviewed requests from contractors for change orders and, if Kilborn approved the request, it submitted the request to Shell for its approval. Kilborn was responsible for getting all of the permits requirement from various levels of governments and government agencies for the construction of the project, although Shell did obtain directly the permits respecting water and air quality. While Kilborn was responsible for obtaining the remaining permits, Lounsbury co-ordinated the gathering of the data required to make application for the permits.

25. Boisclair's responsibility as Shell's construction foreman was to assure that safety was looked after on the site and that the construction was being done according to acceptable construction practices. While he was on the site daily for this purpose, neither he nor anyone else from Shell is involved directly in the daily contact between Kilborn and the contractors or in any direct contact with the contractors.

26. The Board has considered the full submissions of the parties on both issues, but, for purposes of this decision will set out summaries only of the submissions.

27. With respect to the abandonment issue, counsel for Shell submits that the following particular facts establish the factual basis for the Board to conclude that Local 1669 had abandoned its bargaining rights for carpenters and their apprentices. Shell maintained an active and visible construction presence in Local 1669's territory from 1969, when Local 1669 failed in its attempt to get Shell to recognize Local 1669 on jobs contracted out by Shell and also withdraw its request for arbitration of the issue, until September 6, 1978 when the first Carpenters Provincial Agreement superseded the Exchange Agreement respecting carpenters represented by Local 1669 in the ICI sector of the construction industry. During the entire period, Local 1669 did not file any grievances respecting the jobs described at paragraph 14, did not give notice to bargain any renewals of their collective agreement, did not bargain with Shell or do anything else to pursue and protect its bargaining rights. Nor did Shell receive any "no board" letter from the Minister of Labour during that period. Subsequent to September 6, 1978 up to the filing of this grievance, Shell continued to maintain an active and visible construction presence in Local 1669's territory and throughout Ontario. During this period, neither Local 1669 nor any of the other carpenters affiliated bargaining agents filed grievances alleging that Shell had violated the Carpenters Provincial Agreement, attempted to assert in any manner the bargaining rights the applicant is now asserting in this application, or conducted themselves in any manner consistent with the belief that Shell was bound to

the agreement. In particular, after the 1982-84 Carpenters Provincial Agreement was amended to provide in Clause 4.01 that work covered by the agreement “shall only be *contracted* or sub-contracted to an Employer bound by this Agreement.” (emphasis added), none of them filed grievances alleging that Shell had breached the requirement that work covered by the agreement be *contracted* only to employers bound to the agreement.

28. On those facts, Shell counsel’s argument that Local 1669 had abandoned its bargaining rights prior to the commencement of provincial bargaining in the ICI sector of the construction industry runs as follows. First, Local 1669 knew, or by the exercise of reasonable diligence, ought to have known of Shell’s construction activities in Local 1669’s territory between 1969 and 1978, and it did nothing to pursue, protect and exercise its bargaining rights despite Shell’s active construction presence. Second, Local 1669’s conduct after September 6, 1978 when the first Carpenters Provincial Agreement came into effect, and the conduct of the other carpenters affiliated bargaining agents after 1980 when they would have acquired bargaining rights within their own geographic jurisdictions by operation of what is now subsection 139(2) of the Act, is consistent with the fact that they neither acquired nor believed that they had acquired bargaining rights for carpenters vis à vis Shell. In that respect, their conduct after Clause 4.01 was amended in the 1982-84 agreement is particularly relevant. Even assuming that, prior to the amendment, the affiliated bargaining agents believed that Shell was bound to the Carpenters Provincial Agreement but was not breaching Clause 4.01 because it was not “subcontracting” when it did not act as its own general contractor, construction manager or project manager, none of the affiliated bargaining agents has alleged after 1982 that Shell had breached the requirement that work covered by the agreement be *contracted* only to employers who are bound to the agreement. Accordingly, even if Shell was bound by the agreement, the affiliated bargaining agents did nothing to enforce it after Clause 4.01 was amended. That conduct serves to demonstrate and confirm that Local 1669’s bargaining rights had expired before province-wide bargaining because of lack of pursuit or administration of the bargaining rights after they were acquired in 1967.

29. In support of his argument that Local 1669 had abandoned its bargaining rights prior to the commencement of provincial bargaining, counsel referred the Board to *Marineland of Canada Inc.* [1990] OLRB Rep. Dec. 1298, particularly for the proposition that trade union activity following the start of province-wide bargaining is relevant in determining whether abandonment occurred in the period prior to its commencement; *Culliton Brothers Limited*, [1982], OLRB Rep. March 357; *Lorne’s Electric*, [1987] OLRB Rep. Nov. 1405; *Ellis-Don Limited*, [1992] OLRB Rep. Feb. 147 and other cases referred to therein, particularly *R. Reusse Co. Ltd.* [1988] OLRB Rep. May 523.

30. With respect to Shell’s contention that it is the owner and purchaser of construction for Project Excel and not bound by the 1990-92 Carpenters Provincial Collective Agreement, the main thrust of counsel’s argument runs as follows. Shell has not operated a business in the construction industry since 1967 when Local 1669 was certified as exclusive bargaining agent for carpenters and apprentices employed by Shell in the District of Thunder Bay, or, at the very least, since 1969. Instead, Shell has fulfilled its construction requirements by purchasing the construction services of general contractors, specialty contractors, construction managers and project managers. It has not been its own contractor, construction manager or project manager and has not employed directly any carpenters or other construction trades. Therefore, up to and including Project Excel, Shell has conducted itself as an owner of construction and not as an employer in the construction industry, as employer is defined in section 119 of the Act. Its contract with Kilborn for Project Excel and the involvement of Shell’s representatives on the project is not a departure from that approach and is entirely consistent with it. Their involvement is nothing more than what any prudent owner of a \$70 million construction project would do and, as a prudent owner, Shell was not going to sit

back and simply wait to be told when the project was complete. In summary, Shell did not act any differently than any other owner not bound by the Carpenters Provincial Collective Agreement and should not be treated any differently than any owner not bound to that agreement. In this respect, counsel referred the Board to *The Municipality of Metropolitan Toronto*, [1981] OLRB Rep. March 300 (Metro Toronto #1); and, *The Municipality of Metropolitan Toronto*, [1989] OLRB Rep. March 279 (Metro Toronto #2).

31. Further, counsel submits, the evidence demonstrates that the carpenters affiliated bargaining agents have accepted the fact that Shell has been performing construction as an owner and not as an employer because, even after the start of province-wide bargaining in the ICI sector, none of them took the position that Shell was bound to the series of Carpenters Provincial Agreements which were the product of that bargaining. More significantly, after Clause 4.01 was amended in the 1982-84 agreement in response to the result in *Kapuskasing Board of Education*, [1981] OLRB Rep. Mar. 300 (Kapuskasing #2), so as to require employers who were bound to the agreement to *contract* work only to other employers who were bound to it, none of the affiliated bargaining agents claimed that Shell was bound by that or subsequent agreements until this application was made in 1991. In view of the fact that Shell has not changed the way in which it has purchased construction since at least 1969, it would be a repugnant result to say now that Shell was anything other than an owner.

32. Thus, counsel argues, from the conduct of Local 1669 prior to province-wide bargaining and of all of the affiliated bargaining agents since then, the Board ought to conclude that they either believed that they had no bargaining rights vis à vis Shell, or they believed that Shell has been operating as an owner and, therefore, not bound by successive provincial agreements. It must be one or the other because, without Shell having changed the way it has operated, there is no foundation for the applicant's claim that Shell has suddenly become an employer bound by the Carpenters Provincial Collective Agreement.

33. Applicant counsel argued that both branches of Shell's "abandonment of bargaining rights" defence to the grievance contain internal inconsistencies. Abandonment is about bargaining rights and, according to Shell, Local 1669's bargaining rights only applied to it when Shell was acting as an employer and did not apply when it was acting as an owner. Therefore, if that premise is accepted along with Shell's evidence and argument that, ever since Local 1669 was certified Shell has acted as an owner and not as an employer, Local 1669 had no bargaining rights to abandon with respect to Shell as an owner. Similarly, if the successive Exchange Agreements and the provincial agreements which followed them were not binding on Shell as an owner, as it has argued, Shell could not have breached any of those agreements, including the agreements from 1982-84 to 1990-92 containing the amended Clause 4.01. Therefore, there were no grounds on which Local 1669 or the other affiliated bargaining agents could have pursued a grievance. For the same reason, counsel submits, the conduct of the affiliated bargaining agents after 1978 is irrelevant to determining whether Local 1669 had abandoned its bargaining rights prior to province-wide bargaining.

34. Furthermore, counsel argues, the facts establish that not only did Local 1669 assert its bargaining rights on the few occasions when it was called upon to do so, Shell failed to disclaim those bargaining rights when it had an opportunity to do so. In that respect, Local 1669 asserted its bargaining rights in the ICI sector and other sectors vis 2[vis Shell when it responded to the application for accreditation made by the Construction Association of Thunder Bay Incorporated. It did so by naming Shell as an employer with whom it was entitled to bargain in those sectors respecting carpenters and their apprentices in the relevant sectors of the construction industry. When Shell made its Employer Return respecting the same application, it had the opportunity to expressly deny that Local 1669 was entitled to bargain with it. It did not do so. This was in 1973, and was

Shell's first opportunity since 1969 to say that Local 1669 did not have bargaining rights. According to counsel, the facts show that Local 1669 did not have any further opportunity to assert its bargaining rights until the introduction of province-wide bargaining. At that time, Local 1669 gave notice to Shell that the Exchange Agreement would cease to be binding on them in the ICI sector as at April 30, 1978 and that the union would be bargaining a provincial agreement. Local 1669 also notified its designated employee bargaining agency that Shell was an employer for whose carpenters and apprentices Local 1669 held bargaining rights in the ICI sector. On those grounds, counsel argues, Local 1669 not only did not abandon its bargaining rights between 1969 and 1978, it exercised them on the only opportunities it had. Therefore its bargaining rights in the ICI sector remained intact when the first provincial agreement was negotiated, were subsumed by that agreement and remained intact under successive provincial agreements until this grievance was made under the 1990-92 agreement.

35. With respect to Shell's alternate defence that it was not bound by the 1990-92 Carpenters Provincial Collective Agreement on Project Excel because it was the owner and purchaser of construction for the project and not an employer within the meaning of the construction part of the Act respecting the project, applicant counsel relies primarily upon *Metro Toronto #2*, *supra*. He submits that it represents the current law on the issue and stands for the proposition that, once it has been established that a party to a grievance referred under section 126 of the Act is bound by a provincial agreement (and the 1990-92 Carpenters Provincial Collective Agreement is one) by reason of that party being a person for whose employees affiliated bargaining agents have bargaining rights, the only relevant question about that party's activities on the project which is the subject of the grievance is whether those activities violated some provision of the agreement. For that reason, counsel submits, the Board in *Metro Toronto #2* rejected the notion that, except for any question of interpretation of the agreement, the Board is bound to consider whether a party to a referral to arbitration under section 126 was acting as a person operating a business in the construction industry in respect of the subject matter of the grievance. Counsel argues further that, even if there can be a threshold question of whether a party was acting as a person operating a business in the construction industry, the question should be answered in the affirmative if the person was responsible for bringing about the construction and had the power to choose how and by whom the construction would be performed. He submits that the Board applied that test in *Metro Toronto #2* when it found at paragraph 34 that Metro's power to choose "...how and by whom the construction would be performed is enough to make it a 'person who operates a business in the construction industry' for any relevant statutory purpose.". The same test applied here would lead to the same conclusion, he argues, because the facts establish that Shell had the power to choose how and by whom the construction of Project Excel would be performed.

36. Applicant counsel submits also that the Board's decision in *Metro Toronto #2 supra*, has significance for the abandonment issue as well. In his view, until that decision, the law was unsettled and equivocal respecting whether a distinction ought to be made between someone acting as an "owner" such that no one can be bound by a construction industry collective agreement when acting in that capacity in the purchase of construction services. The Board should take that state of the law into account, counsel argues, when assessing Shell's claim that the failure of any of the carpenter affiliated bargaining agents to file a grievance after Clause 4.01 was amended in the 1982-84 Carpenters Provincial Collective Agreement to require that work covered by the agreement be contracted only to parties bound by the agreement was conduct consistent with Local 1669 having abandoned its bargaining rights prior to province-wide bargaining in the ICI sector. According to counsel, the uncertain state of the law until *Metro Toronto #2* was such that it was reasonable for carpenters affiliated bargaining agents to believe, as Shell had contended in 1969 to Local 1669, that the provincial agreement did not apply to Shell when it was operating as an owner in the purchase of construction services.

37. The Board turns first to consider whether Local 1669 had abandoned its bargaining rights prior to province-wide bargaining in the ICI sector. The concept that a trade union can abandon bargaining rights acquired through the certification process or voluntary recognition has been established in the Board's jurisprudence for more than thirty years. See for example *Hugh Murray Limited*, [1979] OLRB Rep. July 664, which, at paragraph 10, relies on *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110 to demonstrate that the Board has jurisdiction to conclude that a trade union has lost its bargaining rights through abandonment; and, *Lorne's Electric*, [1987] OLRB Rep. Nov. 1405. The Board's jurisdiction to determine whether a trade union has abandoned bargaining rights was confirmed by the Divisional Court in *Re Carpenters' District Council and Hugh Murray [1974] Ltd.* (1980), O.R. (2d)670. The question of whether bargaining rights have been abandoned is a question of fact.

38. Counsel for Shell acknowledged that the question of fact in this case is whether Local 1669 abandoned its bargaining rights prior to the commencement of province-wide bargaining in 1978. However, counsel argued that the Board ought to determine that question by examining events both prior to and after that time and, in that respect, referred the Board to *Marineland of Canada*, *supra*. In that case, the Board was deciding whether one of the carpenters affiliated bargaining agents (Local 38) had abandoned by March 3, 1978 its bargaining rights for carpenters employed by Marineland. The Board described in paragraph 16 how it should approach that question, stating in part:

16. ... As the question of whether abandonment has occurred is a question of fact, we must take into account all of the circumstances. See *Lorne's Electric*, (*supra*) for a discussion of the principles of abandonment. In this respect, we do not consider only the events between September, 1977 and March, 1978, in deciding whether abandonment had occurred by the latter date. Events occurring after March 3, 1978 can be relevant in assessing the meaning or effect of the union's inactivity before that date. Just as events occurring after a collective agreement has been negotiated and signed can assist an adjudicator in determining the intended meaning of particular clauses in the agreement, so too can subsequent events shed light on the question of whether abandonment had occurred by March 3, 1978.

The Board went on to examine events during a 12-year period commencing September 1977 when the Minister of Labour issued a "no board" letter to Local 38 and Marineland and 1989 when Local 38 sought to enforce the terms of the carpenters 1988-90 Provincial Collective Agreement. The Board's assessment of those events and Local 38's conduct during those 12 years led it to conclude that Local 38 had abandoned its bargaining rights by March 3, 1978. Counsel for Shell asks the Board to come to the same conclusion respecting Local 1669 based on the events spanning the period 1969 to the making of this grievance on January 16, 1991 and on the conduct during that period of Local 1669 and the other carpenters affiliated bargaining agents.

39. March 3, 1978 is a relevant date for this application too. It is the date on which Local 1669's authority to bargain and conclude a collective agreement for the ICI sector was transferred to the carpenters designated employee bargaining agency. By operation of statute, on that date that agency was given the sole authority to bargain and conclude a provincial agreement on behalf of Local 1669 binding on Shell and other employers for whose carpenters and apprentices Local 1669 held bargaining rights in the ICI sector. At about the same time, a designated carpenters employee bargaining agency was authorized by operation of statute to bargain and conclude a provincial agreement on behalf of Shell and other employers for whose employees Local 1669 held bargaining rights in the ICI sector. See the discussion of the operation of the statutory provisions at paragraph 18 of *Lorne's Electric*, *supra*. The same thing was taking place with respect to other carpenters affiliated bargaining agents and the employers for whose carpenters and apprentices the agents held bargaining rights in the ICI sector. The two designated bargaining agencies negotiated the first Carpenters Provincial Agreement, the Provincial Collective Agreement effective Septem-

ber 6, 1978 to April 30, 1980. In 1980, what is now subsection 139(2) was added to the Act. Its effect was to deem that Shell (and other employers like it for whose carpenters and apprentices Local 1669 held bargaining rights in the ICI sector) had recognized the bargaining rights of all other carpenters affiliated bargaining agents in the province. Thereafter, the two designated bargaining agencies bargained for and concluded a series of two-year (as required by the Act) provincial agreements beginning with the 1980-82 agreement to the 1990-92 agreement under which this grievance was made. Through that bargaining regime, Shell became bound to the Carpenters Provincial Collective Agreement throughout Ontario and remains bound until the bargaining rights under the agreement are terminated by the Board in an application for termination of bargaining rights or by a finding that the union can no longer rely on those rights because Local 1669 had abandoned them by March 3, 1978, as claimed by Shell.

40. The events between August 2, 1967 when Local 1669 was certified and March 3, 1978 and its conduct during that period, in the Board's view, point clearly in the direction of Local 1669 not having abandoned its bargaining rights by March 3, 1978. To the contrary, whenever it had an opportunity to assert its bargaining rights, it did so. Following certification, Local 1669 quickly signed a collective agreement with Shell which bound them to the Exchange Agreement and subsequent changes to or renewals of it "...to the same extent as though [Shell] has executed such agreement as a member of the Lakehead Builders' Exchange...". Local 1669 subsequently negotiated successive renewals of the Exchange Agreement which were in effect in the ICI sector of the construction industry until April 30, 1978. During the first renewal, Local 1669 attempted to exercise its bargaining rights again by notifying Shell in March 1969 that it was referring a grievance to arbitration alleging that Shell had breached the agreement requirement to subcontract only to other contractors bound to the Exchange Agreement. Local 1669 withdrew its request in the face of Shell's claim that it was owner of the project in question, was not the employer of any carpenters or apprentices on it and had not subcontracted any work to other contractors. Local 1669 next asserted its bargaining rights when it responded to the application for accreditation made on May 15, 1973 between the expiry date of the second renewal and the effective date of the third renewal of the Exchange Agreement. Finally, as a direct consequence of the designation of the carpenters employee bargaining agency on March 3, 1978, Local 1669 asserted its bargaining rights when it notified Shell that the Exchange Agreement would cease to operate April 30, 1978 with respect to the ICI sector and that a provincial agreement was being negotiated for that sector which might affect Shell, and notified the carpenters employee bargaining agency that Local 1669 had bargaining rights in the ICI sector vis 2[vis Shell for carpenters and their apprentices. Shell also acknowledged Local 1669's bargaining rights twice between 1969 and March 3, 1978; first, when it named its nominee to a board of arbitration respecting the March, 1969 grievance; and second, when it failed to deny in its Employer's Return to the application for accreditation that Local 1669 was entitled to bargain with it respecting carpenters and their apprentices.

41. The fact that Local 1669 did not file any grievances with Shell after March, 1969, or serve any notice on Shell to bargain, does not detract from the fact that Local 1669's conduct points to it having asserted its bargaining rights rather than having abandoned them. The absence of grievances alleging that Shell had breached the Exchange Agreement is entirely consistent with Local 1669's withdrawal of its grievance in 1969 and the fact that after Shell and Local 1669 became bound to the Exchange Agreement, Shell did not employ any construction trades on its projects within the geographic scope of that Agreement, and had all of the projects performed for it by general contractors, speciality trade contractors, construction managers and project managers. With respect to the fact that Shell did not receive any notice to bargain from Local 1669, having regard to the terms of their collective agreement set out at paragraph 6, the absence of any express terms for its termination, Shell's agreement that it be bound by the Exchange Agreement and subsequent changes to or renewals of it "...to the same extent as though [Shell] has executed such agreement

as a member of the Lakehead Builders' Exchange...", and the notice provision of the Exchange Agreement set out at paragraph 7, it is not surprising that Local 1669 did not serve Shell with notice to bargain under either agreement. Even if Local 1669 erred in not giving Shell notice, its failure to give notice in those circumstances is not indicative that Local 1669 had abandoned its bargaining rights during that period.

42. In asking the Board to consider the conduct of Local 1669 and the other carpenters affiliated bargaining agents after the start of province-wide bargaining, counsel for Shell focused primarily on the continued absence of notice to bargain and the failure of Local 1669 and the affiliated bargaining agents to file grievances alleging violation of Clause 4.01 even though Shell had many construction project on which non-union contractors were engaged to do carpentry work within the jurisdiction of several of the affiliated bargaining agents, including Local 1669. The absence of notice to bargain does not signal any failure to assert bargaining rights because no purpose would have been served by such notice since neither the carpenters affiliated bargaining agents nor their designated employee bargaining agency was obliged to serve Shell with notice to bargain under the province-wide bargaining scheme. While the failure of Local 1669 and the other affiliated bargaining agents to file grievances against Shell after March 2, 1978, until this grievance, might suggest that they did not realize that they held the bargaining rights which the applicant is now asserting, the absence of grievances during this period is also suggestive, in the circumstances, of a belief that the Provincial Collective Agreement was not being breached, rather than a belief that no bargaining rights were held. In this respect, the Board has considered the fact that Shell had not altered the way it executed its construction activities since 1969 when Local 1669 withdrew its grievance at arbitration; that, until the Board issued its decision in *Metro Toronto #2*, *supra*, the Board's jurisprudence as represented by its decision in *Brant County #1* and *Brant County #2*, *supra*, left the impression that an employer operating in a manner similar to Shell might not be bound by the terms of a construction industry collective agreement; and, that this grievance was brought within a reasonable period after the law in that respect was clarified by *Metro Toronto #2*. In all of the circumstances, including post 1978 behaviour of the carpenters affiliated bargaining agents, the more likely inference is that Local 1669 had not abandoned its bargaining rights.

43. For the foregoing reasons, the Board finds that Local 1669 had not abandoned its bargaining rights in the ICI sector of the construction industry for carpenters and carpenters' apprentices vis 2[vis Shell Canada Limited by March 3, 1978.

44. It is necessary, therefore, for the Board to deal with Shell's alternate defence to the grievance that it was acting in the capacity of an owner to purchase construction services with respect to Project Excel and, as a result, was not an employer in the construction industry and not bound by the 1990-92 Carpenters Provincial Collective Bargaining Agreement for purposes of that project.

45. As the Board has already noted, after Clause 4.01 was amended in the 1982-84 Carpenters Provincial Collective Agreement, the Board's jurisprudence as represented by its decisions in *Brant County #1* and *Brant county #2*, *supra*, left the impression that there may be a threshold question under a provincial agreement like the one at issue herein of whether a person like Shell is "a person who operates a business in the construction industry" when acting as an owner in the purchase of construction as described herein. If there is such a question and it is answered in the negative, the implication is that the person, while acting in that capacity, would not be an employer bound by the subject provincial agreement. The Board in *Metro Toronto #2*, *supra*, dealt with the issue of whether it was bound to consider whether a respondent employer in a reference to arbitration like this one was acting as a person operating a business in the construction industry in respect to the subject matter of the grievance. The Board reviewed the law in

Kapuskasing #2, *Brant County #1* and *Brant County #2* at paragraphs 7 through 11 and, against that background, in paragraphs 12 through 33 assessed the parties' submissions, thoroughly analysed the relevant statutory provisions and jurisprudence and concluded that the Board is not bound to consider whether the respondent to a referral to arbitration under what is now section 126 of the Act "... was acting as a person operating a business in the construction industry in respect of the subject matter of the grievance.". The Board also held that, even were it wrong in that conclusion, the control test suggested in *Brant County #2* was not the correct method of answering the question. Its conclusions are summarized as follows at paragraph 34.

34. In summary, once it is established that the respondent is bound by the subject provincial agreement by reason of it being a person for whose employees affiliated bargaining agents have bargaining rights then, in our view, the only relevant question about its activities in relation to the subject project is whether those activities violated some provision of that provincial collective agreement. We respectfully reject the conclusion of the panel in *Brant #1* that there is a threshold question whether Metro is also a "person who operates a business in the construction industry", either generally or in relation to the project which is the subject of the grievance. If that is a threshold question, however, we reject the control test postulated in *Brant #1* as the method of answering it. The fact that Metro was responsible for bringing about the construction and had it in its power to chose [sic] how and by whom the construction would be performed is enough to make it a "person who operates a business in the construction industry" for any relevant statutory purpose.

46. In that case, Metro Toronto was the respondent in a grievance referral. It had engaged a consulting engineering firm to design and execute for Metro Toronto a construction project in the ICI sector. In terms of Metro's budget process, it was a capital works project. Metro was bound to the electricians provincial agreement for the ICI sector. The agreement obligated Metro to sublet work covered by the agreement only to another person bound to it. Metro let a contract for electrical work covered by the agreement to a contractor not bound by the agreement. When that action generated a grievance referred under the Act, one of Metro's defences to the grievance was that, for purposes of its capital works projects, when it was acting in the capacity of an owner to purchase construction services, it was not an employer in the construction industry within the meaning of section 119 of the Act. Its argument in support of that defence was similar in substance to that made here by Shell in support of its defence that, respecting Project Excel, it was acting in the capacity of an owner to purchase construction and, therefore, not an employer in the construction industry within the meaning of section 119 of the Act. The Board in *Metro Toronto #2* rejected Metro's argument for the reasons given in paragraphs 12 through 33. The Board herein respectfully agrees with that reasoning.

47. While the subject project in that case was relatively very small in comparison to Project Excel, the essential general facts of the business relationship between Metro and the firm of consulting engineers are not materially different than those respecting the relationships between Shell, Kilborn and Shell's design consultants, except possibly for Kilborn's equipment procurement responsibilities for the project.

48. This panel finds the reasoning in *Metro Toronto #2*, *supra*, to be equally applicable to the circumstances of this case and adopts that reasoning. Further, and in any event, the Board is satisfied that the Agreement leaves no doubt that Shell, not Kilborn, was responsible for bringing about the construction on Project Excel and had the power to choose how and by whom the construction would be performed. Therefore, for the same reasons as expressed in *Metro Toronto #2*, the Board is satisfied that Shell had the sort of control over Project Excel which would make it an employer in the construction industry. It may well be that the terms of the Agreement were terms which any prudent purchaser of construction for a \$70 million project would require in a contract with a construction manager, but that does not alter the fact that the terms gave Shell the power to

choose how and by whom the construction would be performed. Therefore, with respect to Project Excel, the Board finds that Shell was bound by the Provincial Collective Agreement in effect from May 1, 1990 to April 30, 1992 between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America.

49. The parties agreed that the Board need only determine the two preliminary issues and need not determine whether Shell breached that agreement on Project Excel. Indeed, applicant counsel acknowledged that, should the Board find Shell to be bound by the agreement, the Board's declaration to that effect likely would be sufficient remedy. In these circumstances, the Board remains seized with this application respecting any other matters which the parties are unable to resolve.

50. Accordingly, the Board directs that this matter be adjourned *sine die* for a period not exceeding one year. Unless within that time either party requests that the Board proceed with the matter, it will be terminated.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1992

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0158-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Italian Canadian Benevolent Corporation (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Italian Canadian Benevolent Corporation (Toronto District) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Italian Canadian Benevolent Corporation (Toronto District) in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1141-91-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. G. Hammer Mechanical Ltd. (Respondent) v. Sheet Metal Workers' International Association, Local #285 (Interveners)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of G. Hammer Mechanical Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of G. Hammer Mechanical Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector and the residential sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

2928-91-R; 3095-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Union Taxi (Respondent) v. Group of Employees (Objectors)

Unit: "all Dependent Contractors of Union Taxi, in its Taxi Service, working in the City of North Bay, save and except supervisors, those above the rank of supervisor, management trainees, dispatchers, call takers, maintenance staff, office and clerical staff, and multi-car/multi-plate owners/lessees." (10 employees in unit)

3095-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Union Taxi (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Union Taxi in its Taxi Service operating as drivers under the roof sign "Union Taxi", in the City of North Bay, save and except supervisors, persons above the rank of supervisor, maintenance staff, office and clerical staff, dependent contractors, multi-plate/multi-car owners/lessees, management trainees, dispatchers, call takers" (41 employees in unit)

0600-92-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666 (Applicant) v. 918983 Ontario Limited cob as K.C. Plumbing & Heating (Respondent)

Unit: "all plumbers and plumbers' apprentices, in the employ of 918983 Ontario Limited cob as K.C. Plumbing & Heating in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices in the employ of 918983 Ontario Limited cob as K.C. Plumbing & Heating in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1166-92-R: Ontario Public Service Employees Union (Applicant) v. Family Service Bureau of South Waterloo (Respondent)

Unit #1: "all employees of Family Service Bureau of South Waterloo in the City of Cambridge, save and except supervisors and persons above the rank of supervisor, employees employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

1327-92-R: Labourers International Union of North America Ontario Provincial District Council (Applicant) v. Van Bree Drainage & Bulldozing Limited (Respondent)

Unit: "all construction labourers in the employ of Van Bree Drainage and Bulldozing Limited in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1328-92-R: Labourers International Union of North America Ontario Provincial District Council (Applicant) v. Van Bree Drainage & Bulldozing Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of Van Bree Drainage and Bulldozing Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Van Bree Drainage and Bulldozing Limited in all other sectors of the construction industry in the County of Lambton, save and except persons employed in the industrial, commercial and institutional sector of the construction industry, non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1537-92-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Mount Carmel House Treatment Centre Inc. (Respondent)

Unit: "all employees of Mount Carmel House Treatment Centre Inc. in the Township of Charlottenburgh, save and except Assistant to the Executive Director, persons above the rank of Assistant to the Executive Director, Program Director" (21 employees in unit)

1606-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Ault Foods Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Ault Foods Limited in the Town of Mitchell regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Supervisors, persons above the rank of Supervisor, office, clerical and lab staff and employees in bargaining units for which any trade union held bargaining rights as of September 1, 1992" (34 employees in unit) (*Having regard to the agreement of the parties*)

1616-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Alita Construction Limited (Respondent)

Unit: "all employees of Alita Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Alita Construction Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of

Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

1629-92-R: Energy and Chemical Worker’s Union (Applicant) v. Anco Chemicals Limited (Respondent)

Unit: “all employees of Anco Chemicals Limited in the Town of Vaughan, save and except Forepersons, persons above the rank of Foreperson, office, clerical and sales staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

1681-92-R: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Burns International Security Services Ltd. (Respondent)

Unit: “all Security Guards employed by Burns International Security Services Ltd. in the Counties of Wellington and Brant and in the Regional Municipality of Waterloo, save and except Site Supervisors, persons above the rank of Site Supervisor, office staff, sales staff and students employed during the school vacation period” (194 employees in unit) (*Having regard to the agreement of the parties*)

1693-92-R: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Coriglione Contracting (Respondent)

Unit: “all painters and painters’ apprentices in the employ of Coriglione Contracting in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of Coriglione Contracting in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit) (*Clarity Note*)

1694-92-R: London & District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. St. Joseph’s Health Centre of London (Respondent)

Unit: “all employees of St. Joseph’s Health Centre of London (Marian Villa) regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Registered Nurses, Undergraduate Nurses, Supervisors, persons above the rank of Supervisor, Co-ordinators, technical professional personnel, office and clerical staff” (70 employees in unit) (*Having regard to the agreement of the parties*)

1721-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Windsor Environmental Services Limited (Respondent)

Unit: “all employees of Windsor Environmental Services Limited in the City of Windsor, save and except Superintendent and persons above the rank of Superintendent” (3 employees in unit) (*Having regard to the agreement of the parties*)

1725-92-R: Glass, Molders, Pottery, Plastics & Allied Workers International Union (Applicant) v. Peninsula Plastics Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Peninsula Plastics Limited in the Town of Fort Erie, save and except foremen, persons above the rank of foreman, office and sales staff” (21 employees in unit) (*Having regard to the agreement of the parties*)

1743-92-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Fordyce and Frampton Electrical Contractors Limited (Respondent)

Unit: “all electricians’ and electricians’ apprentices in the employ of Fordyce and Frampton Electrical Contractors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of Fordyce and Frampton Electrical Contractors Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1754-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Norweld Oxygen Inc. (Respondent)

Unit: “all employees of Norweld Oxygen Inc. at 925 Barrydowne Road in the City of Sudbury, save and except Supervisors, persons above the rank of Supervisor, outside sales persons, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (4 employees in unit) (*Having regard to the agreement of the parties*)

1759-92-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. Bakers’ Pride Limited (Respondent)

Unit: “all employees of Bakers’ Pride Limited at Alexandria, save and except Supervisors, persons above the rank of Supervisor, office and sales staff” (15 employees in unit) (*Having regard to the agreement of the parties*)

1777-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 366 Bay Street in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1778-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 2 Tecumseth Street in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor and persons regularly employed for not more than 24 hours per week” (7 employees in unit) (*Having regard to the agreement of the parties*)

1780-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at Buttonville Airport in the Town of Markham, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

1781-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 372 Bay Street in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1782-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 11 Morse Street in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

1783-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 1460 The Queensway in the Municipal-

ity of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

1784-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of the Paragon Protection Ltd. at 2 Gibbs Road in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1785-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at Credit Valley Hospital in the City of Mississauga, save and except Supervisors and persons above the rank of Supervisor” (14 employees in unit) (*Having regard to the agreement of the parties*)

1786-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 6700 North West Drive in the City of Mississauga, save and except Supervisors and persons above the rank of Supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

1807-92-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Ogden Allied Services Inc. (Respondent)

Unit: “all employees of Ogden Allied Services Inc. at Vista Cargo, 6500 Silver Dart Drive in the City of Mississauga, save and except non-working Forepersons, persons above the rank of non-working Foreperson, clerical and sales staff” (12 employees in unit) (*Having regard to the agreement of the parties*)

1815-92-R: London & District Service Workers’ Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. 904122 Ontario Ltd. (Respondent)

Unit: “all employees of 904122 Ontario Ltd. in the Town of St. Thomas, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff, Registered and Graduate Nurses” (11 employees in unit) (*Having regard to the agreement of the parties*)

1820-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Conestoga Meat Packers Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Conestoga Meat Packers Ltd. on Woolwich Road #80 in the Township of Woolwich, save and except Supervisors, persons above the rank of Supervisor, office and sales staff” (18 employees in unit) (*Having regard to the agreement of the parties*)

1844-92-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses, Sault Ste. Marie, Ontario Branch (Respondent)

Unit: “all registered and graduate nursing assistants employed in a nursing capacity at Victorian Order of Nurses, Sault Ste. Marie, Ontario Branch, in the District of Algoma, save and except Supervisors, persons above the rank of Supervisor and clerical staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

1845-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Constructions Valbert (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Constructions Valbert in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Constructions Valbert in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (9 employees in unit)

1854-92-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Brant County Roman Catholic Separate School Board (Respondent)

Unit #1: "all Teachers' Aids of the Brant County Roman Catholic Separate School Board in the County of Brant, save and except Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than 24 hours per week and persons for whom any trade union held bargaining rights on the date of application September 29, 1992" (17 employees in unit) (*Having regard to the agreement of the parties*)

1874-92-R: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Continental Acoustics & Drywall Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Continental Acoustics & Drywall Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Continental Acoustics & Drywall Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1894-92-R: Labourers' International Union of North America, Local 506 (Applicant) v. Northtown Structural Limited (Respondent)

Unit: "all construction labourers in the employ of Northtown Structural Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Northtown Structural Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1919-92-R: United Steelworkers of America (Applicant) v. Nipissing Community Legal Clinic (Respondent)

Unit: "all employees of Nipissing Community Legal Clinic in the City of North Bay, save and except Executive Director, persons above the rank of Executive Director, placement students and persons regularly employed for not more than 24 hours per week" (3 employees in unit) (*Having regard to the agreement of the parties*)

1925-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: "all security guards in the employ of Paragon Protection Ltd. at 100 Metropolitan Road in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

1926-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: "all security guards in the employ of Paragon Protection Ltd. at Almore Park Towers, 4 Lisa Street in the City of Brampton, save and except Supervisors and persons above the rank of Supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

1927-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: "all security guards in the employ of Paragon Protection Ltd. at 9500 McLaughlin Road in the City of Brampton, save and except Supervisors and persons above the rank of Supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

1928-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 2085 Hurontario Street in the City of Mississauga, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1929-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 195 Walker Drive in the City of Brampton, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1930-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 1400 Castlefield Avenue in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1931-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 105 Adelaide Street West in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1932-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 1001 Roselawn Avenue in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

1933-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 150 Bartor Road in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

1935-92-R: Christian Labour Association of Canada (Applicant) v. 601192 Ontario Limited c.o.b. as Simcoe Terrace (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by 601192 Ontario Limited c.o.b. as Simcoe Terrace in the City of Barrie, save and except Director of Care, persons above the rank of Director of Care and persons for whom any trade union held bargaining rights as of October 2, 1992” (4 employees in unit) (*Having regard to the agreement of the parties*)

1950-92-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. The Corporation of the Town of Dunnville (Respondent)

Unit: “all office employees of the Corporation of the Town of Dunnville, at Dunnville, regularly employed for not more than 24 hours per week, save and except Deputy Clerk and Deputy Treasurer, Clerk’s Department Secretaries (no more than two), persons employed pursuant to the provisions of a Federal or Provincial Government subsidized program, and employees in bargaining units for whom any trade union held bargaining rights as of October 2, 1992” (2 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0937-92-R: The Ontario Secondary School Teachers’ Federation (Applicant) v. The Renfrew County Board of Education (Respondent)

Unit: “all occasional teachers and supply instructors employed by The Renfrew County Board of Education in its Secondary Panel in the County of Renfrew, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act” (173 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	173
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	2

1538-92-R: The Union of Bialik Jewish Studies Teachers (Applicant) v. Bialik Hebrew Day School (Respondent) v. The Federation of Teachers in Hebrew Schools (Intervener)

Unit: "all teachers employed by Bialik Hebrew Day School in the Municipality of Metropolitan Toronto, in the field of Jewish education, save and except the Principal and persons above the rank of Principal" (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of ballots marked in favour of applicant	21

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0687-92-R: Canadian Union of Public Employees (Applicant) v. Whitby All Saints Residence Corp., operating as Colborne Residential Services (Respondent) v. Crown in Right of Ontario (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of Whitby All Saints Residence Corp., in the Town of Whitby, save and except supervisors, Housing Project Managers, persons above the rank of supervisor, and students employed during the summer vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	7

0985-92-R: Ontario Public Service Employees Union (Applicant) v. Le Conseil des Écoles Françaises de la Communauté Urbaine de Toronto (Respondent)

Unit: "toutes les enseignantes suppléantes et les enseignants suppléants employés par Le Conseil des Écoles Françaises de la Communauté Urbaine de Toronto travaillant dans la communauté urbaine de Toronto à l'exception des personnes couvertes par les conventions collectives existantes" (55 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	61
Number of persons who cast ballots	13
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	0

1352-92-R: Canadian Union of Public Employees (Applicant) v. Markham Stouffville Hospital (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Markham Stouffville Hospital in the Town of Markham, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical and technical personnel, office and

clerical staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (116 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	118
Number of persons who cast ballots	103
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	98
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of ballots marked in favour of applicant	58
Number of ballots marked against applicant	42
Number of ballots segregated and not counted	3

Applications for Certification Dismissed Without Vote

0440-92-R: Practical Nurses Federation of Ont. (Applicant) v. Strathroy Middlesex General Hospital (Respondent) (51 employees in unit)

1648-92-R: International Association of Bridge Structural Steel & Ornamental Ironworkers Local 765 (Applicant) v. Rockland Iron Work Ltee Ltd. (Respondent) (4 employees in unit)

1810-92-R: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Luso Toronto Masonry Ltd. (Respondent)

Unit: “All Bricklayers, stonemasons, apprentices, trainees, bricklayers’ assistants and forklift drivers, engaged in all types of construction including but not limited to renovation, alteration and repairs save and except those persons above the rank of non-working foreman, office and clerical staff, while working in the Province of Ontario.” (12 employees in unit)

1827-92-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. The Board of Education for the City of Etobicoke (Respondent) (26 employees in unit)

1880-92-R: Gogama Forest Products Employee Association (Applicant) v. Gogama Forest Products Ltd. (Respondent) (35 employees in unit)

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0872-91-R: London and District Service Workers’ Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Strathroy Nursing Homes Ltd. (Respondent)

Unit: “all employees of Strathroy Nursing Homes Ltd. in Strathroy, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period” (34 employees in unit)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	16

Applications for Certification Withdrawn

0083-91-R: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Northern Panel Systems Division of 709696 Ontario Ltd. (Respondent)

3402-91-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Union Taxi (Respondent) v. Group of Employees (Objectors)

1326-92-R: Labourers International Union of North America Ontario Provincial District Council (Applicant) v. 975122 Ontario Limited carrying on business as Pearson Brothers Drainage (Respondent) v. Group of Employees (Objectors)

1574-92-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Gavigan Contracting Ltd. (Respondent)

1578-92-R: Canadian Union of Public Employees (Applicant) v. Toronto Hospital Veterinary Services (Respondent)

1670-92-R: United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C. (Applicant) v. LOEB Club Plus Meadowlands (Respondent)

1723-92-R: Canadian Union of Public Employees (Applicant) v. Ontario March of Dimes (Respondent)

1779-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

1889-92-R: United Steelworkers of America (Applicant) v. Nipissing Community Legal Clinic (Respondent)

1918-92-R: United Steelworkers of America (Applicant) v. Work Wear Corporation of Canada Ltd. (Respondent)

2075-92-R: International Association of Machinists & Aerospace Workers (Applicant) v. Maitland Lewis Enterprises Ltd. (Respondent)

2076-92-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Excel Coach Lines Ltd., Kenora, Ontario (Respondent)

FIRST AGREEMENT - DIRECTION

1706-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Taylor Masonry Ltd. (Respondent) (*Withdrawn*)

1707-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Rose-garden General Masonry Construction (Respondent) (*Granted*)

1708-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Dave Brown Masonry Ltd. (Respondent) (*Granted*)

1709-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Delgados Bricklayers Ltd. (Respondent) (*Granted*)

1710-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Joshua Tree Construction Ltd. (Respondent) (*Granted*)

1711-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Minho Masonry Ltd. (Respondent) (*Granted*)

1712-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. J & K Stone Masonry Specialists (Respondent) (*Granted*)

1713-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Casabella Masonry Ltd. (Respondent) (*Granted*)

1714-92-FC: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. ACDMC Group Inc. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0790-91-R: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Italian Canadian Benevolent Corporation (Toronto District); The Italian Canadian Benevolent Seniors' Apartment Corporation; and Italian Canadian Projects for Seniors Inc. (Toronto District) (Respondents) (*Granted*)

0208-92-R: National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1411 (Applicant) v. Roamer Boat Works Inc. and Grew Canada Inc. (Respondents) (*Withdrawn*)

0644-92-R: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Soubliere Interiors Limited and Cumberland Interiors Ltd. (Respondents) (*Withdrawn*)

0802-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Cayer Tree Service Limited, 973443 Ontario Limited, M & M Ontario Land Clearing (Respondents) (*Withdrawn*)

1570-92-R: International Brotherhood of Painters and Allied Trades, Local 1904 (Applicant) v. Norev Canada Inc., Kejach Leasing Limited, Topcoat Restorations (1992) Inc. and Topcoat Restorations Ltd. (Respondents) (*Granted*)

1882-92-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Gavigan Brothers Asphalt Paving and Gavigan Contracting Ltd. (also c.o.b. as Gavigan Paving Stone) (Respondents) (*Withdrawn*)

1972-92-R: Sentinel Employees Association (Applicant) v. Sentinel Vehicles (1990) Ltd. and 883860 Ontario Ltd. c.o.b. as Sentinel (Respondents) (*Granted*)

2006-92-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Applicant) v. MAC Reinforcing Ltd. and 860716 Ontario Limited (Respondents) (*Granted*)

SALE OF A BUSINESS

0208-92-R: National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1411 (Applicant) v. Roamer Boat Works Inc. and Grew Canada Inc. (Respondents) (*Withdrawn*)

0644-92-R: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Soubliere Interiors Limited and Cumberland Interiors Ltd. (Respondents) (*Withdrawn*)

0891-92-R: Office and Professional Employees International Union, Local 290 (Applicant) v. Avestel Credit Union Limited (Respondent) v. Office and Professional Employees International Union, Local 343 (Intervener) v. Group of Employees (Objectors) (*Withdrawn*)

1570-92-R: International Brotherhood of Painters and Allied Trades, Local 1904 (Applicant) v. Norev Canada Inc., Kejach Leasing Limited, Topcoat Restorations (1992) Inc. and Topcoat Restorations Ltd. (Respondents) (*Granted*)

1882-92-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Gavigan Brothers Asphalt Paving and Gavigan Contracting Ltd. (also c.o.b. as Gavigan Paving Stone) (Respondents) (*Withdrawn*)

1971-92-R: Sentinel Employees Association (Applicant) v. Sentinel Vehicles (1990) Ltd., 883860 Ontario Ltd. c.o.b. as Sentinel (Respondents) (*Granted*)

2005-92-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Applicant) v. MAC Reinforcing Ltd. and 860716 Ontario Limited (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0874-92-R: Kenneth W. Lyon (Applicant) v. Retail, Wholesale and Department Store Union AFL:CIO:CLC (Respondent) v. Peacock Lumber Ltd. (Intervener)

Unit: "all employees of Peacock Lumber Ltd. in the City of Oshawa, save and except Supervisors and those employees above the rank of Supervisor, office and clerical staff, sales staff, students employed during the school vacation period and persons employed for less than 24 hours per week" (11 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	0

1387-92-R: Michael R. Melvin, Employee of the Ontario Ironworkers/Rodmen Benefit Plan Administrators Inc. (Applicant) v. United Food and Commercial Workers' International Union, Local 175 (Respondent) v. Ontario Ironworkers/Rodmen Benefit Plan Administrators Inc. (Intervener)

Unit: "all employees of Ontario Ironworkers and Rodmen Benefit Plan Administrators Inc. in the Municipality of Metropolitan Toronto, save and except Managers, persons above the rank of Manager, confidential secretary and persons regularly employed for not more than 24 hours" (10 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	10

1461-92-R: Gerald Matte (Applicant) v. Teamsters Local Union No. 91 (Respondent) v. National News Co. Ltd. (Intervener)

Unit: "all employees of National News Company Limited in the Regional Municipality of Ottawa-Carleton, save and except Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than 24 hours per week, office, sales, and marketing staff, students employed during the school vacation period and temporary employees employed to replace absent employees covered by this agreement" (36 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	35
Number of ballots marked in favour of respondent	17
Number of ballots marked against respondent	18

1679-92-R: Mary C. Russell (Applicant) v. Service Employees Union, Local 183 (Respondent) v. Sisters of St. Joseph of the Diocese of Peterborough (Intervener)

Unit: “all lay employees of the Sisters of St. Joseph of the Diocese of Peterborough at 1545 Monaghan Road, Peterborough, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff, registered and graduate nurses, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (20 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	20
Number of persons who cast ballots	20
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	12

1695-92-R: Local 8945 (Applicant) v. United Steelworkers of America (Respondent) v. Marley Roof Tiles Limited (Intervener) (9 employees in unit) (*Granted*)

1793-92-R: Rod Merritt (Applicant) v. United Steel Workers of America Local 5481 (Respondent) v. Carr Steel Const. (1987) Ltd. (Intervener) (6 employees in unit) (*Granted*)

1881-92-R: Flora Ceccomancini (Applicant) v. CAW Canada National Automobile, Aerospace and Agricultural Implement Workers Union of Canada Local Union 252 (Respondent) v. Caterpillar of Canada Limited (Intervener) (*Withdrawn*)

1917-92-R: William Bairstow (Applicant) v. Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. Mississauga Warehousing Ltd. (Intervener) (2 employees in unit) (*Granted*)

1995-92-R: The Employees of Grange W. Elliott Ltd., John G. Cooper, Doug L. Hull, Jeff D. Overland, Jeff M. Morrison (Applicants) v. Labourers’ International Union of North America, Local 247 (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1973-92-U: Sentinel Employees Association (Applicant) v. Sentinel Vehicles (1990) Ltd. and 883860 Ontario Ltd. c.o.b. as Sentinel and Dennis Ellesmere (Respondents) (*Withdrawn*)

2074-92-U: Ferranti-Packard Transformers Ltd. (Applicant) v. United Steelworkers of America, Local 5788, Leon Renneboog, Joe Berce, R. Hand, W. Harrison, S. Filion and Mark Renner (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1914-92-U: Premier Pipelines Inc. and Murphy Contracting Inc. (a Joint Venture) (Applicants) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, David Clark and Sean O’Ryan (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

1974-92-U: Sentinel Employees Association (Applicant) v. Sentinel Vehicles (1990) Ltd., 883860 Ontario Ltd. c.o.b. as Sentinel and Dennis Ellesmere (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0436-90-U: Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1244 (Complainant) v. Inplant Contractors Inc., The Ontario Erectors Association, International Association of Bridge, Structural and Ornamental Iron Workers - Local Union No. 700 (Respondents) (*Withdrawn*)

3122-90-U: Heather Dianne Vadum (Complainant) v. Hotel Employees Restaurant Employees Union, Local 75, Toronto Hilton (Respondents) (*Granted*)

0519-91-U: Iwa - Canada (Complainant) v. Loger Toys Ltd. (Respondent) (*Withdrawn*)

1580-91-U: Canadian Union of Public Employees and its Local 3501 (Complainant) v. The Boys' Home (Respondent) (*Withdrawn*)

3042-91-U: Glenn Noble (Complainant) v. J. M. Schneider Inc. and The Schneider Employees Association (Respondents) (*Dismissed*)

3196-91-U: Arthur Witt (Complainant) v. Tri-Clover Canada Ltd. (Formerly Ladish Co. of Canada), CAW Local 397 (Respondents) (*Withdrawn*)

3247-91-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. The Brick Warehouse Corporation Clearance Centre (Respondent) (*Withdrawn*)

3423-91-U; 0578-92-U: Service Employees Union, Local 210 (Complainant) v. Windsor Raceway Inc. (Respondent) (*Withdrawn*)

3723-91-U: The Ontario Public Service Employees Union and its Local 668 (Complainant) v. Larch Radiological Services (Respondent) (*Withdrawn*)

3821-91-U: James F. Regan (Applicant) v. Ontario Secondary School Teachers Federation and Scarborough Board of Education (Respondents) (*Dismissed*)

4029-91-U: The Ontario Secondary School Teachers' Federation (Complainant) v. Perth County Board of Education (Respondent) (*Withdrawn*)

0154-92-U: Murray Christianson et al (Complainants) v. United Steelworkers of America, Local 2251, Algoma Steel Corp. Ltd. (Respondents) (*Dismissed*)

0279-92-U: Service Employees Union, Local 268 (Complainant) v. The Corporation of the Town of Marathon, Brian Thoradson, Ross Mitchell and April Knowles (Respondents) (*Withdrawn*)

0303-92-U: Service Employees Union, Local 210 (Complainant) v. Salvation Army Grace Hospital (Respondent) (*Withdrawn*)

0479-92-U: Wellington Separate Support Staff Association (Complainant) v. The Wellington County Separate School Board (Respondent) (*Granted*)

0486-92-U: Richard A. Posivy (Complainant) v. Canadian Union of Public Employees and Local 11 (Respondent) v. North York Hydro (Intervener) (*Dismissed*)

0595-92-U: O.P.S.E.U. and its Local 585 (Complainant) v. Kennedy House Youth Services, Inc. (Respondent) (*Withdrawn*)

0675-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. The Brick Warehouse Corporation (Respondent) (*Granted*)

0822-92-U: Glenn Legault (Complainant) v. Canadian Union of Public Employees Local 3092 (Respondent) (*Dismissed*)

0919-92-U: Rodolfo Piluso (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 18 (Respondent) (*Dismissed*)

0966-92-U: Terry Howey (Complainant) v. George McMenemy, Local 1824 IBPAT (Respondent) (*Withdrawn*)

1012-92-U: Graham Johnson, The Ontario Public Service Employees Union (Applicants) v. The Corporation of the Township of Lake of Bays (Respondent) (*Withdrawn*)

1100-92-U: Joseph Noel (Complainant) v. Essroc Canada Inc. (Respondent) (*Withdrawn*)

1122-92-U: Leroy Fox, Jim Rice, Ron Salmon, Len Shire, John Jarvis, Winston Rice, Al Cheetham, Gus Thompson, W. Alan Herrington, Alex Ferguson (Complainants) v. Labourers' International Union Of North America, Local 247 (Respondent) (*Withdrawn*)

1187-92-U: Joe Danese (Complainant) v. Retail, Wholesale, and Department Store Union (Respondent) v. The Great Atlantic & Pacific Company of Canada Limited (Intervener) (*Dismissed*)

1212-92-U: The Ontario Secondary School Teachers' Federation, District 29, Thunder Bay Division, Pssp Bargaining Unit (Complainant) v. The Lakehead District Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

1254-92-U: Roger M. Avery (Complainant) v. The Metropolitan Toronto Civic Employees Union, Local 43 (Respondent) v. The Parking Authority of Toronto (Intervener) (*Dismissed*)

1264-92-U: William Bernard Zaichkowski (Complainant) v. Graphic Communications Union #466 (Respondent) (*Withdrawn*)

1335-92-U: Brenda R. Bergeron (Complainant) v. SD & G Public School Board (Respondent) (*Withdrawn*)

1336-92-U: Brenda R. Bergeron (Complainant) v. Office & Professional Employees International Union, Local 483 (Respondent) (*Withdrawn*)

1534-92-U: Local 280 of the International Beverage Dispensers' and Bartenders' Union of the Hotel & Restaurant Employees and Bartenders International Union (Complainant) v. 904387 Ontario Ltd. c.o.b. Street-side Inn (Respondents) (*Terminated*)

1597-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Complainant) v. Samuels Restaurant (Respondent) (*Withdrawn*)

1607-92-U: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Complainant) v. Paul Smyth Flooring Ltd. (Respondent) (*Withdrawn*)

1624-92-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Van Bree Drainage and Bulldozing Limited, 975122 Ontario Limited c.o.b. as Pearson Brothers Drainage, Paul Van Bree Sr., Paul Van Bree Jr., and Ken Herrington (Respondents) (*Withdrawn*)

1628-92-U: Christian Labour Association of Canada (Complainant) v. Amber Lea Place (Respondent) (*Withdrawn*)

1630-92-U: Roberto F. Ramirez (Complainant) v. Molson Brewery & Local 0325 Union NUPGE (Respondents) (*Withdrawn*)

1652-92-U: Ralph Harrison (Complainant) v. Executive of Teamsters, Local #230 International Representative - Matt Elliott, Teamsters General President - Ron Carey (Respondents) (*Withdrawn*)

1661-92-U: Amalgamated Clothing and Textile Workers Union (Complainant) v. Mount Carmel Treatment Centre Inc. (Respondent) (*Withdrawn*)

1669-92-U: Service Employees' Union, Local 210 A.F. of L. - C.I.O. - C.L.C. (Complainant) v. Malcolm Manor Retirement Home (Respondent) (*Withdrawn*)

1676-92-U; 2013-92-U: Graphic Communications International Union, Local 500M (Complainant) v. Pro-Art Graphics Ltd. (Respondent) (*Withdrawn*)

1686-92-U: Local Union 636 of the International Brotherhood of Electrical Workers (Complainant) v. Missis-sauga Hydro Electric Commission (Respondent) (*Withdrawn*)

1717-92-U: Bonnie Minor (Complainant) v. United Food and Commercial Workers International Union Local 452P (Respondent) (*Withdrawn*)

1718-92-U: Leslie Lynn Smits (Complainant) v. United Food and Commercial Workers International Union Local 452P (Respondent) (*Withdrawn*)

1719-92-U: Nancy Bodis (Complainant) v. United Food and Commercial Workers International Union Local 452P (Respondent) (*Withdrawn*)

1720-92-U: Josephine Bunz (Complainant) v. United Food and Commercial Workers International Union Local 452P (Respondent) (*Withdrawn*)

1750-92-U: Service Employees Union, Local 210 (Complainant) v. Malcolm Manor (Respondent) (*Withdrawn*)

1751-92-U: Catherine Lidia Rena Staal (Complainant) v. National Automobile, Aerospace and Agricultural Implement Workers of Canada (CAW) Local 127 (Respondent) (*Withdrawn*)

1760-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Julian Taxi Cab Limited and 806966 Ontario Inc. c.o.b. as A-1 Taxi (Respondents) (*Withdrawn*)

1817-92-U: Brent Sheppard (Complainant) v. Emco Ltd. Supply (Respondent) (*Withdrawn*)

1826-92-U: Canadian Union of Public Employees Local 3501 (Complainant) v. The Boys' Home (Respondent) (*Withdrawn*)

1847-92-U: Derrick P. Roy (Complainant) v. The Hotel Employees Restaurant Employers Union, Local 75 (Respondent) (*Withdrawn*)

1864-92-U: Michael Vella (Complainant) v. C.U.P.E., Local 1000 (Respondent) (*Withdrawn*)

1913-92-U: John F. Gyurko (Complainant) v. The Canadian Union of Public Employees Local 167 (Respondent) (*Withdrawn*)

1941-92-U: Pam Thomas (Complainant) v. Bob Ryan (Respondent) (*Dismissed*)

1954-92-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O. C.L.C. (Complainant) v. Kettle Creek Gardens (Respondent) (*Withdrawn*)

1960-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC and its Local 414 (Complainant) v. Office and Professional Employees International Union, Local 343 AFL:CIO:CLC (Respondent) (*Withdrawn*)

1975-92-U: Sentinel Employees Association (Complainant) v. Sentinel Vehicles (1990) Ltd., 883860 Ontario Ltd. c.o.b. as Sentinel and Dennis Ellesmere (Respondents) (*Withdrawn*)

2001-92-U: William Pidgeon (Complainant) v. Domtar Inc., Domtar Fine Papers a Division of Domtar Pulp and Paper Group (Respondents) (*Withdrawn*)

2067-92-U: Antonio Carvalho (Complainant) v. C. N. Rail (Respondent) (*Dismissed*)

2073-92-U: Randy James Hicks (Complainant) v. ASEA Brown Boveri Inc. (Respondent) (*Dismissed*)

2105-92-U: Pro-Art Graphics Ltd. (Complainant) v. Graphic Communications International Union, Local 500M (Respondent) (*Withdrawn*)

2117-92-U: Evelyn Thornton (Complainant) v. St. Mary's General Hospital (Respondent) (*Dismissed*)

2130-92-U: Office and Professional Employees International Union, Local 343, AFL-CIO-CLC (Complainant) v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC and its Local 414 (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0787-92-M: Fleet Industries, a Fleet Aerospace Company (Employer) v. International Association of Machinists and Aerospace Workers, Frontier Lodge 171 (Trade Union) (*Granted*)

1739-92-M: OPSEU and its Local 521 (Trade Union) v. Fortune Society of Canada Inc. (Employer) (*Granted*)

JURISDICTIONAL DISPUTES

2827-90-JD: Inplant Contractors Incorporated (Complainant) v. Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1244 and Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Respondents) (*Dismissed*)

2933-91-JD: Ontario Nurses' Association (Complainant) v. The Donwood Institute and Local 541 of the Ontario Public Service Employees Union (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0466-92-M: Laurentian Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Terminated*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3390-91-OH: Gordon H. Duffy (Complainant) v. Thyssen Marathon Canada Ltd. (Respondent) (*Withdrawn*)

0014-92-OH: Brian May (Complainant) v. Arkell Foods Ltd. (Respondent) (*Withdrawn*)

0914-92-OH: David Haydn Lewis (Complainant) v. The Board of Education for the City of Toronto (TBE) and Supervisory Officer, Jack Gourlie, (TBE) and other Employees (Respondents) v. The Ontario Public School Teachers' Federation (Intervener) (*Withdrawn*)

0998-92-OH: Helen Lee (Complainant) v. St. Olga's Nursing Homes (Respondent) (*Withdrawn*)

1558-92-OH: Guy Leblanc (Complainant) v. Sunnybrook Centre for Independent Living and Sunnybrook Health Science Centre (Respondents) (*Withdrawn*)

1988-92-OH: Bonnie Spitzig (Complainant) v. John Crane Canada Inc., Paul Bennett - Manager (Respondents) (*Withdrawn*)

COMPLAINTS UNDER THE ENVIRONMENTAL PROTECTION ACT

2423-90-EP: Alan G. Marshall (Complainant) v. Varnicolor Chemical Ltd. (Respondent) (*Granted*)

CONSTRUCTION INDUSTRY GRIEVANCES

0337-88-G: Millwright District Council of Ontario on its behalf and on behalf of Local 1244 (Applicant) v. Inplant Contractors Inc. (Respondent) v. Ironworkers District Council of Ontario and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Intervener) (*Withdrawn*)

2715-89-G: United Brotherhood of Carpenters and Joiners of America, Local Union 1256 (Applicant) v. Vic West Steel Limited (Respondent) v. Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers International Association, Local 539 (Interveners) (*Withdrawn*)

0303-90-G: Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1244 (Applicant) v. Inplant Contractors Incorporated (Respondent) v. Ironworkers, Local 700 (intervener) (*Withdrawn*)

2983-91-G: Bricklayers, Masons Independent Union of Canada - Local 1 (Applicant) v. Com-Star Construction Ltd. (Respondent) (*Granted*)

0224-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 and Bruno Pombert (Applicants) v. Paul Smyth Flooring Ltd. (Respondent) (*Withdrawn*)

0225-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Paul Smyth Flooring Ltd. (Respondent) (*Withdrawn*)

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0645-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Soubliere Interiors Ltd. and Cumberland Interiors Ltd. (Respondents) (*Withdrawn*)

0708-92-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Armor Masonry and Precast Ltd. (Respondent) (*Granted*)

0712-92-G: The IBEW Electrical Power Systems Construction Council of Ontario and International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Ontario Hydro and The Electrical Power Systems Construction Association (Respondent) (*Withdrawn*)

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1744-92-G: International Brotherhood of Painters and Allied Trades Local 1795 Glaziers (Applicant) v. 4 M Installations Inc. (Respondent) (*Granted*)

1762-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Torwest Electric Ltd. (Respondent) (*Granted*)

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1823-92-G; 1824-92-G; 1825-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Installation Cinco Inc./Tapis Tanguay Inc. (Respondents) (*Withdrawn*)

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1923-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Collingwood Plumbing Limited (Respondent) (*Granted*)

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A Monthly Series of Decisions from the
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Selected decisions of particular reference value are
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SOBEYS INC.; RE UFCW, LOCAL 1000A 1237

1789-92-R; 1790-92-R Labourers' International Union of North America, Local 183, Applicant v. **Metropolitan Toronto Condominium Corporation #880; Metropolitan Toronto Condominium Corporation #897; Metropolitan Toronto Condominium Corporation #934**, Respondents.

Certification - Related Employer - Union seeking to represent building resident superintendents and asserting that 3 condominium corporations are related employers - Membership and board of directors of corporations entirely separate, but common property manager acting on behalf of the 3 corporations - Board finding employment activities of the superintendents inter-related and inter-dependent - "Common direction and control" residing in property manager extending to all day-to-day activities relating to purposes of the corporations - Board issuing related employer declaration - Certificate granted

BEFORE: *S. Liang*, Vice-Chair, and Board Members *J. Lear* and *J. Kurchak*.

APPEARANCES: *Ronald Davis*, *W. Ruzczak* and *B. Palazzollo* for the applicant; *John Mastoras* and *Andy Wallace* for the respondents.

DECISION OF THE BOARD; December 21, 1992

1. These matters are an application for certification, and an application made pursuant to the provisions of subsection 1(4) of the *Labour Relations Act*. In the application for certification, the parties have met with a Labour Relations Officer and reached agreement on most issues. Outstanding between them is the question as to the identity of the respondent to the application. The parties agree that if the Board finds in favour of the applicant in the section 1(4) application, then the proper respondent is Metropolitan Toronto Condominium Corporation #880, Metropolitan Toronto Condominium Corporation #897 and Metropolitan Toronto Condominium Corporation #934. The parties are also agreed that if the Board declines to declare that the three corporations constitute related employers for the purposes of the Act, then there will be three separate (though identically described) bargaining units and three separate respondents.
2. Although Wallace, McBain and Associates ("Wallace") was originally named as a respondent to the proceedings, on consent of the parties, it has been removed.
3. Each of the condominium corporations represents a building located on Wynford Drive in the City of North York. Together they form a group of condominium buildings called the "Palisades". Each building is administered by the board of directors of its respective condominium corporation. Although the residential buildings are distinct real estate holdings of each corporation, the complex also includes some common lands, such as a recreation centre, whose use is shared amongst the residents of all three buildings and whose ownership is also shared among the three corporations.
4. Each of the three corporations has retained Wallace as a property manager to administer its affairs. As well, each of the corporations has a resident superintendent who is supervised by Wallace personnel on behalf of the corporation. The bargaining unit which the applicant seeks to represent, and which the respondents agree is appropriate (subject to the determination of the section 1(4) issue), is an "all employee" unit, save and except property manager, persons above the rank of property manager, security guards and office and sales staff. The parties are agreed that at the present time, the only employees in the unit in the employ of the corporations are the resident

superintendents. The parties are also agreed that for the purposes of the count, one of the three superintendents was not at work during the relevant period.

5. At the hearing with respect to the issues under section 1(4) of the Act, the parties were able to agree on the following statement of facts which they presented to the Board:

1. At various points in 1990, each of MTCC #880, MTCC #897 and MTCC #934 were created following registration of their respective declarations and legal descriptions in accordance with the *Land Titles Act (Ontario)* and the *Condominium Act (Ontario)*.
2. MTCC #880, MTCC #897 and MTCC #934 have a total of 192, 190 and 202 units respectively.
3. MTCC #880, MTCC #897 and MTCC #934 are separate and distinct legal entities in respect of the municipal premises respectively known as 215 Wynford Drive, 205 Wynford Drive and 195 Wynford Drive, all of which are located in the City of North York, in the Municipality of Metropolitan Toronto. Each condominium corporation has its own board of directors constituted in accordance with the *Condominium Act* to manage the affairs of the corporation (s. 15).
4. Management of each respective condominium property is the responsibility of the condominium corporation as per the *Condominium Act* (s. 12).
5. Each unit owner in each respective condominium corporation shares the assets of that corporation in the same proportions as the proportions of their common interest in accordance with the *Condominium Act*, the declaration and the by-laws s.13(20) and s.7).
6. The registration in 1990 of the declaration and description in respect of each condominium corporation created a corporation without share capital whose members constitute owners of the corporation. Such owners are owners of the freehold estate or estates in a unit and a common interest (s.10(1) and s.1(1)).
7. The objects of each condominium corporation are to manage the property and any assets of the corporation. The corporation has a duty to control, manage and administer the common elements and assets of the corporation and to effect compliance by the owners with the *Condominium Act*, the declaration, the by-laws and the rules (s. 12).
8. The duties and powers of each respective condominium corporation are set out in its by-laws (Respondents' Book of Exhibits at Tab 8, 9 and 10).
9. Each of MTCC #880, MTCC #897 and MTCC #934 share ownership of the "common units" and "common lands" as tenants-in- common in accordance with the declaration applicable to each such condominium (Respondents' Book of Exhibits at Tabs 8, 9 and 10).
10. Each of MTCC #880, MTCC #897 and MTCC #934 are parties to a Shared Facilities and Cost Sharing Agreement which confers upon each of them a reciprocal cost-sharing obligation in connection with lands common to the three corporations, recreational units, visitors parking units and transformer unit. The use and maintenance of common lands and common units are governed by a common management committee with representatives from each of the corporations (Respondents' Book of Exhibits at Tab 8, 9 and 10).
11. Prior to registration of the requisite declaration and description, the developer, Palisades Realty Holdings Corporation (the "Declarant"), was the owner in fee simple of all lands and premises occupied by each respective condominium corporation.
12. The Declarant retained its own property manager until September 30, 1991. Subse-

quently, each of MTCC #880, MTCC #897 and MTCC #934 individually and separately retained Wallace, McBain & Associates Ltd. ("Wallace") as property manager for a one year term. Each of these contractual relationships has been renewed for a further year, effective October 1, 1992. Such contracts contain a 60-day "no cause" clause, whereby any or all of MTCC #880, MTCC #897 and MTCC #934 can, upon providing 60-days notice to Wallace, terminate those services provided by Wallace.

13. The specific duties of Wallace are set out in Part IV and V of the Management Contract (Respondents' Book of Exhibits at Tabs 6, 7 and 8).
14. The superintendents currently at each of MTCC #880, MTCC #897 and MTCC #934 were the "resident superintendents" or "resident managers" of each respective condominium property prior to the engagement of Wallace as property manager on October 1, 1991. Each such superintendent has been paid by the condominium corporation for which property he has been responsible (Respondents' Book of Exhibits at Tab 15, 16 and 17).
15. The duties of each superintendent in connection with each respective condominium corporation property are set out in a job description (Respondents' Book of Exhibits Tab 18, 19 and 20).
16. Wallace provides day-to-day direction and control over such superintendents.
17. When any one superintendent is on holiday, vacation or day off, the other superintendents are required to perform superintendents' work at the absent superintendent's condominium property. This arrangement is reciprocal and "equal" in the sense that it benefits each condominium corporation in the same proportion.
18. Each superintendent is "on call" every third weekend in respect of all three condominium properties from 4:00 p.m. the Friday of such weekend to the following Monday at 8:00 a.m. The purpose of being "on call" is primarily to respond to emergencies, to supervise any Saturday "moves" or deliveries and to perform the normal checks on the recreation centre. This arrangement is also reciprocal and equal in the sense set out above.
19. Superintendents also "rotate" through recreation centre responsibilities on a monthly basis with each superintendent performing the necessary recreation centre functions on a daily basis for a period of one month in every three month period. This arrangement is also reciprocal and equal in the sense set out above.
20. MTCC #880 has 259 owner parking stalls (and 48 visitor stalls) in Area C of the parking garage. MTCC #897 has 258 owner parking stalls (and 40 visitor stalls) in Area B of the parking garage. MTCC #934 has 274 owner parking stalls (and 50 visitor stalls) in Area A of the parking garage. Each respective superintendent is responsible for the area of the parking garage attributable to his condominium corporation.
21. All substantial cleaning and maintenance work performed in connection with each condominium corporation property is "contracted out" and no employees of any condominium corporation or of Wallace are engaged in these functions. Similarly, all cleaning and maintenance work in connection with the common units and common lands are contracted out and are not performed by employees of any condominium corporation nor by any employee of Wallace.

6. The parties also agreed on some further facts at the hearing, without necessarily agreeing as to their relevance. Among these are the following. The condominium complex shares a common vehicle entrance which is controlled by a common security guard. As well, there is a common entrance to the underground parking facility. The Palisades Recreation Centre, which contains a swimming pool and other recreation facilities and a mechanical room, together with tennis courts and the lands surrounding the three buildings and portions of the parking garage, are part of the

common lands. Prior to the establishment of the three condominium corporations, the lands were owned by the developer, who retained a single property manager.

7. One of the resident superintendents has been off work on Workers' Compensation Benefits for approximately one month. During his absence, the other resident superintendents have performed at least some of his work. Some of his duties have also been assumed by the superintendent's spouse. As well, on two weekends when this superintendent would normally be on duty, the corporation retained a security guard from Burns Security to satisfy the weekend security duties. Each superintendent has at least one day off per week. All residents of all buildings are given the telephone numbers of each superintendent as well as a schedule of his hours on duty. Each superintendent who is off duty programs his telephone to forward telephone calls to the superintendent on duty. During the month that a particular superintendent is responsible for the recreation centre, these duties may take one to two hours per day. The superintendents are expected to clean the entrance ramp and the ramps between the levels of the parking garage on every other day.

8. It is also not in dispute that the property manager prepares a separate budget and financial statement for the approval of each condominium corporation. Each condominium corporation retains a separate lawyer (although they were represented by common counsel at this hearing). The respondents state that the duties of the property manager with respect to the administration of staff constitute about 5% of the services provided to the corporations. The applicant stated that it was not in a position to confirm or disagree with this estimate, but regards this fact as irrelevant in any event.

9. In addition to the above facts, the parties entered a book of documents which include the membership lists of the corporations, management contracts between Wallace and each of the corporations, the Declarations under the *Condominium Act*, the By-laws of each corporation, and the Shared Facilities Agreement entered into between the corporations with respect to the use and maintenance of common lands. As well, the Board has banking documents relating to the corporations, some sample salary and benefits cheques made out to the superintendents, and job descriptions for the superintendents. The banking documents indicate that personnel from Wallace have co-signing authority along with members of each of the boards of directors of the corporations. The pay cheques show that each superintendent is paid by cheque issued by the corporation employing him. They also show that Wallace pays for the costs of a common benefit plan for the employees, for which it is reimbursed by the corporations. The job descriptions for the superintendents are identical, and are consistent with the facts stated above. The corporate documents are also identical for the corporations.

10. After receiving the facts as stipulated by the parties, and prior to commencing argument on the issues, counsel for the respondents indicated that he wished to call evidence on some further material facts. After hearing the submissions of the parties, the Board allowed the respondent to add some statements of facts to the evidence, which were not disputed by the applicant and which have been incorporated into our description of the facts above. The Board however refused to allow the respondents to call evidence with respect to the history of property management contracts at other condominium complexes in the Toronto area. This issue had not been disclosed to the applicant prior to the hearing, either in the Reply or in the proposed Statement of Facts submitted by counsel for the respondents to counsel for the applicant on the morning of the hearing. Further, this evidence appeared to this panel to have dubious relevance with respect to the issues before us.

Argument of the Parties

11. Counsel for the applicant states that the three condominium corporations are engaged

in the related or associated business of providing the services of the condominium corporation and the recreation centre to the owners of the corporation. These services are provided to the owners by the carrying on of an associated activity. The element of common direction and control comes from the nature of the duties of the superintendents, who provide a common benefit to the owners. As well, the element of common direction and control exists in the supervision of all of the buildings by the same property manager. Further, counsel refers the Board to the various rights of way and easements which the corporations have given to each in order to provide mutual access for the purpose of maintaining the premises. Counsel also refers the Board to the provisions of the "Shared Facilities Agreement" in which it is provided that where one corporation is derelict in its obligations to maintain the common lands, the other corporations can arrange to have work done and apportion the cost amongst all parties. Counsel states that, in fact, the obligations under the Shared Facilities Agreement, apply to *all* of the condominium lands, and not just the common lands.

12. Essentially, counsel characterizes this arrangement as one where three separate entities, with separate officers and members, have decided to carry on their business of the operation of condominium buildings and a recreation centre as an associated or related business through a common agent, giving common direction to their respective employees. The Board, it is asserted, should not fragment an otherwise appropriate bargaining unit by dividing it into three units.

13. Counsel for the respondent states that the only material nexus between the three condominium corporations is the use of Wallace as a property manager. This link, in fact, can be broken. Counsel refers the Board to the management contracts which give either party to the contracts the right to terminate the agreement on 60 days notice. A declaration under section 1(4) would be inappropriate where the link between the corporations may only be temporary, and could be broken. Ultimately, it is argued, each corporation has the responsibility for the management of its own condominium, through its separate board of directors. There is no common control or direction of the corporations. The duties of the recreation committee, on which sit representatives of each condominium, are narrowly proscribed. Counsel disputes the assertion that the Shared Facilities Agreement relates to all the condominium lands, and states that it is confined to the common lands. On our review of the document, it appears that counsel are both partially right, in that this agreement provides for mutual obligations with respect to common lands *plus* portions of each separate property which are available for common use, as well as shared services such as telephone, hydro or electrical systems.

14. Further, it is submitted by the respondent, with respect to employment matters, each superintendent is paid by his respective condominium corporation and lives on the condominium property managed by the corporation. The exchange of employees amongst corporations is a matter of mere administrative convenience. In fact, it is argued, the total number of hours that one superintendent may spend performing duties with respect to other condominiums is minimal. As for Wallace, although it has been retained by all the corporations, it is subject to the direction of each corporation through its board of directors.

15. In argument, the parties directed the Board to the following cases: *United Shelters Ltd.*, [1981] OLRB Rep. June 796; *Widcor Limited*, [1989] OLRB Rep. Jan. 66; *J.D.S. Investments Limited and Martin Ross Construction Ltd.*, [1981] OLRB Rep. March 294; *Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388 and *Ethyl Canada Inc.*, [1982] OLRB Rep. July 998.

Decision of the Board

16. Section 1(4) of the Act provides:

1.- (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

17. In *Brant Erecting*, [1980] OLRB Rep. July 945 at pages 948 and 949 the Board explained the legislative purpose of section 1(4):

"Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to the employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activity under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on, legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 [64] which preserves the established bargaining rights and collective agreement when a 'business' is transferred from one employer to another ...

18. In *Radio Shack*, [1979] OLRB July 689, at pages 691 and 692, the Board stated:

"Section 1(4) of the Act is designed to deal with situations where more than one legal entity carries on related business or activities under common control and direction and where 'it may not make industrial relations sense to allow the legal form to dictate and possibly fragment the collective bargaining structure.' There are three conditions which must be met before the section can be applied.

- (a) There must be more than one corporation, firm or individual association or syndicate involved.
- (b) These entities must be under common control or direction, and
- (c) They must be engaged in associated or related business activities.

If these three conditions are met the Board is given a discretion under the statute to make a declaration that the entities in question constitute one employer for purposes of the Act. The Board has consistently exercised its discretion under section 1(4) to preserve rather than to extend bargaining rights. It has been reluctant, however, to make a section 1(4) declaration where the applicant union has delayed its application with the result that the declaration will impose a bargaining agent upon a group of employees who may desire a different bargaining agent or no bargaining agent at all."

19. Not all of the Board's comments above are apt in the present case. There may be slightly different considerations informing the exercise of the Board's discretion where a union is seeking a section 1(4) declaration as part of a certification application, and where the declaration is sought in order to preserve established bargaining rights. Whereas in the latter, the prime objective is to prevent the erosion of bargaining rights, in the former, the focus is to "remove roadblocks to viable structures for collective bargaining". However, the common premise in all related employer cases remains the search for "industrial relations sense": see the Board's discussion in *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214. The fact that more than one employer carries on related businesses or activities under common control and direction is an indicator that the alignment of the bargaining structure to the corporate structure may not make the best industrial relations sense.

20. In the case before us, there are three distinct legal entities each with its own employees. The three corporations are managed by boards of directors, which do not overlap in membership. These directors are mandated to carry out the objects of each corporation, which as stated in the *Condominium Act* are “to manage the property and any assets of the corporation”. There is no formal arrangement by which the three corporations have entered into a joint venture or common enterprise in order to do this and by which they have jointly undertaken responsibility for labour relations. Yet, there is no doubt that functionally at least, the corporations are inter-related in the manner in which their objects are carried out.

21. Each corporation has decided to carry out its objects, which are the same objects, through the intermediary of the same project manager, Wallace. Although Wallace is subject to the specific instructions of the corporation, the duties given to Wallace under its management contract include virtually every aspect of the corporations’ objects. Among other things, Wallace is responsible for collecting all the monies owing to the corporation by the owners of the units, for paying the accounts of the corporations, for providing for the maintenance and repair of the facilities, for negotiating and supervising contracts of insurance, for the hiring, payment, supervision and discharge of employees required for the operation and maintenance of the properties, and for the supervision of contractors. The management contracts provide that Wallace may not, in ordinary circumstances, authorize work in excess of \$1,000 without prior authorization of the corporation. In general, though, and subject to the circumstances requiring authorization, the contracts state that Wallace is expected “to do and perform and where desirable contract as agent for and in the name of the Corporation for all things desirable or necessary for the proper and efficient management of the Property”. Some of the work required for the management of the condominium complex is carried out by Wallace itself, such as the collection of monies owing from the owners. Other work is contracted out, such as major cleaning, electrical or other repair or maintenance work, under the direction of Wallace. Finally, day to day basic upkeep, resident liaison, and incidental cleaning, repair and maintenance is provided by the resident superintendents under the supervision of Wallace.

22. As we have indicated, Wallace was originally a respondent to these proceedings but was removed on the consent of the parties. It appears that originally, the applicant was of the view that Wallace might arguably also be an employer of these employees. However, the parties have clearly put their minds to this and are agreed that each individual corporation is the employer of its superintendent. This is the basis of the lists of employees in the bargaining unit for the purposes of the count which forms part of the agreed report of the Labour Relations Officer. In view of the parties’ agreement, therefore, it is not necessary for the Board to examine whether any employment relationship exists between Wallace and the superintendents.

23. In our view, if Wallace is not an employer, then at the very least it acts as the agent of the corporations when it supervises the superintendents, as it also acts as an agent in carrying out all of the duties assigned in the management contract. Despite the apparent independence of the corporations, they in fact pursue their objects through a common agent. Counsel for the respondents objects to the characterization of Wallace as some sort of “collective agent” for the corporations. Yet the fact is that Wallace owes duties to all three corporations. In carrying out its duties, including the supervision of the superintendents, it must have regard to the best interests of all the corporations, and endeavour to harmonize them. Where the supervision of the superintendents relates to the duties associated with the common lands or shared services, the way in which the interests of the corporations are linked is evident. However, in view of the overlap, sharing and exchange of work between the employees, it seems unrealistic to us to view this supervision as separate from Wallace’s supervision of the employees when they are dealing with other than the common lands.

24. Thus, it seems to us to make more labour relations sense to recognize the reality of the common supervision of these employees and the common interests of the corporations, than to uphold the legal distinctions between the three corporations. We do not intend to suggest that common supervision of employees of separate companies is enough to found a declaration under section 1(4). In this case, the purposes of the corporations relate essentially to the management of the condominium buildings and grounds. The corporations have chosen to delegate the tasks required to carry out these purposes to a joint property manager. The “common direction and control” residing in the property manager extends to far more than the common supervision of employees, but includes *all* the day-to-day activities relating to the purposes of the corporations.

25. We also recognize that Wallace may have similar contracts with other condominium corporations (although there was no evidence on this). We do not intend to suggest that other corporations whose employees may be under the direction of Wallace also constitute related employers. In this case, it is clear that the superintendents who are under the common direction of Wallace work under terms and conditions of employment which are inter-related in many ways. Indeed, the very terms of employment require the exchange and sharing of duties amongst the superintendents. A change to the schedule of one superintendent will have an impact on the duties of another. A change in the “on-call” system, or in the duties required with respect to the common lands or shared services, will affect all the superintendents. The absence of one superintendent affects the others, as was demonstrated by the situation where one superintendent was off work on Workers’ Compensation benefits. Ultimately, decisions made by one corporation with respect to the employment of its superintendent will affect the other superintendents. Counsel for the respondent emphasized that there is nothing preventing the corporations from retaining separate property managers. Even if this occurred, it appears to us that there would continue to be very practical reasons for continuing co-ordination between the corporations with respect to their functions and duties. Thus, a change in the management contracts *may* or *may not* change the relationship between the corporations affecting common control and direction. The various factors which we have outlined as indicating the inter-relationships between the corporations may well continue to be relevant.

26. In *Widcor Limited*, [1989] OLRB Rep. Jan. 66, the Board also dealt with an application for a declaration under section 1(4) where the entities in question had separate ownership, directors, officers and shareholders. In that case, the Board stated:

• • •

29. First, we note that entities can be under common control or direction without sharing common owners, shareholders, directors and officers. Notwithstanding the absence of such indicia, the Board will examine the contractual and economic arrangement between the two entities to see if these indicate functional interdependence sufficient to show two entities are under common control or direction. Thus, in *Donald A. Foley*, [1980] OLRB Rep. April 436, the Board stated at page 443:

But section 1(4) both allows and requires the Board to examine the degree of functional interdependence which exist between business entities to it must also look at the contractual and economic arrangements between them, and, in fact, all elements of interdependence.

(See also *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9 at paragraph 104, *Kennedy Lodge Inc.*, [1984] OLRB Rep. July. 931 at paragraph 53).

30. Secondly, the Board has held that common direction or control can be found where two independently owned entities share in a commercial venture. In this regard we note the decision of the Board in *J.D.S. Investments Limited*, [1981] OLRB Rep. Mar. 294 where the Board stated at page 296:

16. The respondents contend that the two firms are not under common control or direction, and in this regard rely on the fact that Martin Ross Construction and J.D.S. Investments Limited have no common shareholders or officers. Although the existence or non-existence of common shareholders and officers is certainly an important factor in deciding whether or not two firms are under common control or direction, the Board has indicated that it is not necessarily the determining factor and that the Board will also consider who, in fact, directs the activities which give rise to employment. See: *Evans-Kennedy Construction Limited* [1979] OLRB Rep. May 388 and *Donald A. Foley Limited*, [1980] OLRB Rep. April 436.

In that case the manner in which the two business entities shared responsibility for the construction of the project, and in particular the manner in which one entity supplied expertise to the other, led the Board to conclude that the entities were under common control or direction. ...

32. Finally, in determining whether there is common direction or control, a number of cases have focused on who, in fact directs or controls the activities which give rise to employment. (See for example *Donald A. Foley*, *supra*, *J. D. S. Investments Ltd.*, *supra*, *Evans Kennedy Construction* [1979 OLRB Rep. May 388, *United Shelters Limited*, [1981] OLRB Rep. June 796, *J.H. Normick Inc.*, *supra*, *Penka Carpentry Ltd.* [1985] OLRB Rep. May 711).

33. In the circumstances of this case, we find the cumulative effect of the following factors to point to common direction or control. Mr. Barclay bid upon and entered into the stipulated price contract on behalf of Green-King while he was still employed as a construction manager of Widcor. Certainly, from a labour relations perspective, the relationship of master and servant is one in which there is an element of control by one party in relation to the other. As construction manager, Mr. Barclay's duties included estimating the cost of construction (a figure of great significance to Widcor Limited as it would ultimately be a major component of the equation used to determine the rent to be paid) and the selection of subcontractors. Mr. Barclay performed those same duties for Green-King. In a bid oriented sector of the construction industry, the essence of the "business" frequently resides in the experience and expertise of its management personnel. In the broad sense, those expert and experienced management personnel control or direct the company, and in particular control or direct the activities which give rise to employment. Tendering projects, supervising work in the field, negotiating subcontracts are highly significant aspects of a general contracting company and often point to who has control or direction of the company and its employees. In the circumstances of this case, that control or direction was common to both Green-King and Widcor by reason of the presence of Mr. Barclay. The common management, the inter-relationship of operations and the centralized control of labour relations, (once again in the person of Mr. Barclay who for example executed minutes of settlement of two matters brought before the Labour Relations Board on behalf of Widcor and who supervised the work performed in the field for both Widcor Limited and Green-King) are factors which point to common or joint direction or control. (See *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720; *Evans Kennedy Construction Ltd.*, [1979] OLRB Rep. May 388, *United Shelters Ltd.*, [1981] OLRB Rep. June 796, *Colt Contracting Co. Ltd.* unreported Board file No. 2550-84-R decision dated November 13, 1986, and *Penka Construction*, *supra*).

27. In the case before us as well, there is no doubt that in many respects the corporations have the appearances of separate control and direction. The memberships of the corporations are entirely separate, as are the boards of directors of each. Yet, as we have stated above, the activities of the corporations which give rise to employment are managed by a common entity on behalf of the three corporations. As well, the employment activities of the superintendents are inter-related and inter-dependent. In this case, the presence of Wallace, the inter-relationship between the employment of the three superintendents with respect to both common and non-common lands, and the inter-relationship between the corporations with respect to joint management of and responsibilities for common lands and shared services, leads us to our conclusion of common control and direction. Further, having found that the three condominium corporations meet the statutory tests of section 1(4) of the Act, we see no reason to refuse the declaration sought. To the extent that there is a possibility that the three corporations may decide in the future to disentangle

their relationships, this is no different than the possibility that exists in any business venture that the economic activity will be divided by the owners.

28. We therefore declare that the respondents constitute one employer for the purposes of the Act. Turning now to the certification application, the Board finds that the applicant is a trade union within the meaning of section 1(1) of the Act.

29. Having regard to the agreement of the parties, the Board further finds that all employees of Metropolitan Toronto Condominium Corporation #880, #897 and #934 at 215, 205 and 195 Wynford Drive in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager, persons above the rank of property manager, security guards and office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

30. In accordance with the Rules of Practice respecting applications for certification, the respondents have filed a list of employees in the bargaining unit, together with specimen signatures for the employees on that list. Having regard to the list filed by the employer, and the finding of the Board with respect to the bargaining unit description, the Board is satisfied that there were 2 employees in the unit at the time the application was made.

31. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards, which consist of combination applications for membership and receipts. The union filed 4 cards, two of which coincide with the names of employees in the bargaining unit. The membership cards are signed by the employees, and the receipts are countersigned and indicate that a payment of one dollar has been made within the six-month period immediately preceding the terminal date for this application. The money was collected by one person and the membership evidence is supported by a duly completed Form 9, Declaration Concerning Membership Documents.

32. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondents in the bargaining unit, at the time the application was made, were members of the applicant on October 1, 1992, the terminal date fixed for this application and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

33. A certificate will issue to the applicant.

2471-89-R Ontario Public Service Employees Union, Applicant v. The Crown In Right of Ontario as represented by the Centennial Centre of Science and Technology (Ontario Science Centre), and **Mil-Dom-Ex Packaging**, Respondents

Bargaining Rights - Crown Transfer - Whether contract for construction and delivery of crates constituting “transfer of part of undertaking” from Crown to private sector packaging company - Board declining to follow KBM case and line of cases propounding “functional” approach to successorship - Board adopting “instrumental” view affirmed by Board in *Metropolitan Parking* case and by Supreme Court of Canada in *Bibeault* case - Board concluding that private sector company using its own undertaking and not acquiring part of Crown’s undertaking - Board satisfied that arrangement not constituting “crown transfer”- Application dismissed

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members G. O. Shamanski and C. McDonald.

APPEARANCES: Kevin Whitaker, Sherry Currie, Tony Petti and Manlio Spessot for the applicant; Peter M. Whalen, John Guthrie and Robert Guthrie for the respondent company; no one appearing on behalf of the respondent Crown.

DECISION OF R. O. MacDOWELL, ALTERNATE CHAIR, AND BOARD MEMBER G. O. SHAMANSKI; December 7, 1992

1. This is an application under the *Successor Rights (Crown Transfers) Act*. It is one of a number of cases currently before the Board, in which OPSEU claims that it has acquired bargaining rights for the employees of a business that has contracted to provide services to the Crown. Because these cases involve similar themes, the decisions are being released contemporaneously. The sections of the *Crown Transfers Act* which are immediately relevant are as follows:

1.-(1)(f) “transfer” means a conveyance, disposition or sale;

(h) “undertaking” means a business, enterprise, institution, program, project, work or a part of any of them.

2.-(1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

4.-(1) Where an undertaking was transferred from the Crown to an employer or from an employer to the Crown and an employee organization, trade union or council of trade unions was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer and,

- (a) a question arises as to what constitutes a unit of employees that is appropriate for collective bargaining purposes in respect of the undertaking; or
- (b) any person, employee organization, trade union or council of trade unions claims that by virtue of section 2 or 3, a conflict exists as to the bargaining rights of the employee organization, trade union or council of trade unions,

any person, employee organization, trade union or council of trade unions concerned may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, and the Board or the Tribunal, as the case requires,

- (c) may determine the composition of the unit of employees referred to in clause (a);
- (d) may amend, to such extent as the Tribunal or the Board considers necessary,
 - (i) any bargaining unit in any certificate issued to any trade union or council of trade unions,
 - (ii) any bargaining unit defined in any collective agreement;
 - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of the undertaking, or
 - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of the undertaking.

(2) Where an undertaking is transferred from the Crown to an employer or from an employer to the Crown, any person, employee organization, trade union or council of trade unions may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown,

- (a) within sixty days after the transfer of the undertaking; or
- (b) within sixty days after written notice is given by the employee organization, trade union or council of trade unions of desire to bargain to make or renew, with or without modifications, a collective agreement,

and the Board or the Tribunal, as the case requires, may terminate the bargaining rights of the employee organization, trade union or council of trade unions bound by a collective agreement in respect of employees employed in the undertaking or that has given notice, as the case may be, if in the opinion of the Board or the Tribunal the transferee of the undertaking has changed the character of the undertaking so that it is substantially different from the undertaking as it was carried on immediately before the transfer.

5.-(1) Notwithstanding section 2, where an undertaking is transferred from the Crown to an employer who intermingles the employees employed in the undertaking immediately before the transfer with employees employed in one or more other undertakings carried on by the employer or an undertaking is transferred from an employer to the Crown and employees employed in the undertaking immediately before the transfer are intermingled with employees employed in other undertakings of the Crown and an employee organization, trade union or council of trade unions that is the bargaining agent in respect of employees employed in any of the undertakings applies to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, the Board or the Tribunal, as the case requires,

- (a) may declare that the employer or the Crown, as the case may be, is no longer bound by the collective agreement referred to in section 2 or 3;
- (b) may determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) may declare which employee organization, trade union or council of trade unions shall be the bargaining agent in respect of each such bargaining unit; and
- (d) may amend, to such extent as the Board or the Tribunal considers necessary,

- (i) any certificate issued to any trade union or council of trade unions,
- (ii) any bargaining unit defined in any collective agreement,
- (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of any of the undertakings, or
- (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of any of the undertakings.

(2) Where an employee organization, trade union or council of trade unions is declared to be a bargaining agent under subsection (1) and it is not already bound by a collective agreement with the successor employer in respect of employees employed in the undertaking that was transferred, the employee organization, trade union or council of trade unions is entitled to give to the successor employer written notice of desire to bargain to make or renew, with or without modifications, a collective agreement.

2. The Union contends that a contract between the Ontario Science Centre and Mil-Dom-Ex Packaging ("Mil-Dom") for the construction and delivery of some crates, constitutes a "transfer of part of an undertaking" from the Crown to Mil-Dom, with the result that the Union's bargaining rights and collective agreement are applicable to Mil-Dom's business - at least for the duration of the contract. Mil-Dom argues, in the alternative that:

- (1) There was no "transfer" within the meaning of section 2.
- (2) Mil-Dom did not acquire anything from the Crown except payment for the crates it manufactured, and certainly did not acquire part of the Crown's "undertaking".
- (3) If Mil-Dom acquired a "part" of the Crown's undertaking for the duration of the contract, section 4(2) of the Act applies because Mil-Dom has "changed the character of the undertaking so that it is substantially different from the undertaking as it was carried on immediately before the transfer". In Mil-Dom's submission the Union's bargaining rights should therefore be terminated.
- (4) For the duration of the contract there was an "intermingling" with Mil-Dom's employees that warrants a declaration under section 5(a) of the Act that it was not bound by the Crown's collective agreement with the Union.
- (5) There was a reversion or re-transfer of the undertaking immediately upon completion of the contract.

The Union agrees with submission (5). It disputes submissions (1)-(4).

3. A hearing in this matter was held in Toronto on December 12, 1990. The Union and

Mil-Dom were both represented by counsel. No one appeared on behalf of the Crown; however, counsel for the Union filed this Agreement:

Board File No. 2471-89-R

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

B E T W E E N:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Applicant

- and -

THE CROWN IN RIGHT OF ONTARIO as represented by THE CENTENNIAL
CENTRE OF SCIENCE AND TECHNOLOGY (ONTARIO SCIENCE CENTRE)
and MIL-DOM-EX PACKAGING

Respondents

AGREED STATEMENT OF FACT OF THE APPLICANT, ONTARIO PUBLIC
SERVICE EMPLOYEES' UNION AND THE RESPONDENT, THE CROWN IN
RIGHT OF ONTARIO as represented by THE CENTENNIAL CENTRE OF SCI-
ENCE AND TECHNOLOGY (ONTARIO SCIENCE CENTRE)

1. On or about October 19, 1989, the Respondent, Centennial Centre of Science and Technology ("the Centre") issued a purchase order (P.O. no. 16093) to the Respondent, Mil-Dom-Ex Packaging ("Mil-Dom-Ex") for the construction of sport show crates.
2. At the time the purchase order was issued, the Applicant, Ontario Public Service Employees' Union, had a collective agreement with the Respondent, the Crown in Right of Ontario, covering employees who performed similar services to those covered by the purchase order.
3. The Applicant, Ontario Public Service Employees' Union, and the Respondent, Crown in Right of Ontario, agree that the issuance of the purchase order constitutes the transfer of an undertaking within the meaning of the *Successor Rights (Crown Transfers) Act*, R.S.O. 1980, c.489.
4. The Applicant, Ontario Public Service Employees' Union, and the Respondent, Crown in Right of Ontario, are therefore in agreement to the issuing of a declaration by the Board with respect to the instant application in the following form:

The Board hereby declares that by virtue of Section 2(1) of the *Successor Rights (Crown Transfers) Act*, the Respondent, Mil-Dom-Ex Packaging, is bound by the collective agreement between the Management Board of Cabinet and the Ontario Public Service Employees' Union with respect to the following bargaining unit:

All employees of Mil-Dom-Ex Packaging who performed services pursuant to a purchase order issued by the Centennial Centre of Science and Technology (Ontario Science Centre) dated on or about October 19, 1989 (P.O. no. 16093), save and except those employees otherwise excluded from the collective agreement between the Management Board of Cabinet and the Ontario Public Service Employees' Union.

DATED AT TORONTO, this 11th day of DECEMBER, 1990.

“Angela E. Rae”

Signature for the Respondent,
The Crown in Right of Ontario
as represented by the Centennial
Centre of Science and Technology
(Ontario Science Centre)

“K. Whitaker”

Signature for the
Applicant, Ontario
Public Service
Employees' Union

4. As will be seen, the Crown and the Union both agree that the contract with Mil-Dom constitutes a transfer of an undertaking within the meaning of the *Crown Transfers Act*. The Crown and the union agree that the collective agreement between the Crown and OPSEU applies to the *employees* of Mil-Dom *insofar as those employees were performing services necessary to fulfil Mil-Dom's contract with the Crown*. The Union also claims that it became the bargaining agent of those employees for the same period and purpose; that is, for the duration of the contract, and insofar as Mil-Dom's employees were doing work associated with fulfilling that contract.

5. Mil-Dom is not a party to this agreement between OPSEU and the Crown, nor are Mil-Dom's employees. Mil-Dom rejects the legal conclusion to which the Crown and the Union have agreed. Mil-Dom's position is set out in paragraph 2 above.

6. The facts are not in dispute.

* * *

7. Mil-Dom runs a packaging business with production facilities in Mississauga, Ontario. The company was incorporated in 1981 and is owned by four individuals. Those individuals have no relationship directly or indirectly with anyone working for the Ontario Science Centre.

8. Mil-Dom's packaging business includes the construction and delivery of wooden crates to a variety of industrial and commercial users. Mil-Dom has never done work for the Science Centre either before or after the contract in question. Mil-Dom has no continuing or even sporadic relationship with this Crown entity, and there is no evidence that Mil-Dom has any relationship with any other manifestation of the Crown.

9. The contract in question is a tiny proportion of Mil-Dom's business. The purchase order from the Science Centre is in the amount of \$16,910.00 to which is added \$3,818.28 in respect of federal and provincial sales tax. This represents about two per cent of Mil-Dom's total sales for 1989. The five invoices associated with the transaction are among the thirty-five that Mil-Dom worked on in October - November 1989. This is only two per cent of the two hundred and nine invoices processed in that calendar year.

10. The contract with the Science Centre arose as a result of a tender request in the form of a “fax” that was transmitted to a number of companies in the crate construction business. It was what Mil-Dom describes as a “cold call”. It was not solicited or anticipated by Mil-Dom, but presumably came because someone at the Science Centre knew of the company's existence and the nature of its business. We do not have the list of companies that received this fax, nor do we know why Mil-Dom was included on this list; however, it clearly had nothing to do with any previous relationship with the Ontario Science Centre. The fax in question reads as follows:

URGENT

FACSIMILE TRANSMITTAL

DATE:	October 16, 1989
TO:	J. Guthrie - Mil Dom Ex
FAX #:	670-2928
FROM:	Tom Kasanda, International Marketing, OSC
FAX #:	416-429-2934

We have an urgent requirement for immediate pricing on the attached items. The need to procure these crates has just been confirmed and *delivery of at least 50% of the order* will be required October 31, 1989. I wish to select a fabricator by 3:00 pm on Tuesday in order to initiate an order prior to leaving Toronto on business. Please fax your quotation to my attention. Kindly direct any questions to Bob Irving at 429-4100 ext 366. Your understanding and assistance in providing an immediate quotation is appreciated.

Sincerely,

Tom Kasanda

International Marketing

11. The request for tender (fax) was supplemented by a "request for quotation" form, which includes this brief description of the work in question:

The Ontario Science Centre has a requirement for prefabricated knock-down re-useable shipping crates to store and ship exhibits from its exhibition on 'Sport'. The exhibition will be dismantled starting 1 November, 1989. Delivery of unassembled crates required on 31 October, 1989

The document then sets out the details of the crates' specifications, construction, materials to be used and necessary fastenings. The request for "quotation" form also contains this advice to potential bidders:

Please quote prices on materials and services listed below subject to the following:

- 1) Prices must include Federal Sales Tax, unless otherwise requested.
- 2) The Ontario Science Centre reserves the right to select any or all items from this tender unless the vendor specifically denies this right.
- 3) Lowest or any tender not necessarily accepted.
- 4) If unable to meet exact specifications and can advise substitute, please do.
- 5) QUOTATION MUST BE MADE ON THIS FORM

12. Neither before nor at the time of the contract did the Ontario Science Centre or any other Crown representative advise Mil-Dom of the potential application of the *Crown Transfers Act*. Nor did anyone suggest that the work or Mil-Dom's employees might be governed by the Crown's collective agreement with the Union. There was no indication from the Crown that when Mil-Dom undertook to supply crates to the Crown's specifications, it was also automatically obliged to make the wages, hours, benefits etc. of its employees conform to those prescribed in the

civil service collective agreement. And there was no indication that this unilateral business decision by Mil-Dom would have the effect of making OPSEU the bargaining agent for Mil-Dom's employees, who had no previous contact or relationship with OPSEU.

13. The packaging and display crates which are the subject of the purchase order were manufactured in Mil-Dom's own facility, using lumber and hardware that Mil-Dom had on hand or purchased with its own resources in order to fulfil the requirements of the contract. The crates were constructed with the company's own equipment, under the company's own supervision, using the company's own employees. There was no input whatsoever from the Ontario Science Centre, other than the description of the crates that it required. The company did not use or depend upon any skills or "know-how" of employees of the Ontario Science Centre.

14. The company allocated two of its employees to do the rough carpentry work associated with the Science Centre order. Each crate required between six to nine hours' work so that, in total, the thirty-eight crates represent between two hundred and fifty - three hundred work hours in the company's shop. To this must be added the time and effort expended to load and deliver those crates (on the company's own truck using its own driver). However, the two employees in question did not work exclusively on the Science Centre order. That was only part of the work in progress at the time. Workers were shifted from job to job in accordance with the availability of materials and the pressure of delivery dates. Counsel observes that if the Board were disposed to make the declaration to which the Union and the Crown have agreed, it would be very difficult to determine the application of the collective agreement or the extent of the Union's bargaining rights. Those rights might vary from hour to hour, and day to day, depending upon the work in which the shop employees might be engaged from time to time. The position of the truck driver might be even more ambiguous if his delivery schedule included both Science Centre material and packaging items for other customers.

15. There is no evidence that any of Mil-Dom's employees are members of OPSEU, have any desire to be represented by OPSEU or have any former connection with OPSEU or the Crown. There is no evidence that during the currency of the contract OPSEU ever approached these employees or made any effort to represent them. We do not know the current terms and conditions of employment for these workers, and therefore cannot determine whether the application of the OPSEU collective agreement would be beneficial or detrimental to them. All that can be said is that if OPSEU's application is granted, their employer's choice of customer may produce an automatic revision of their terms of employment while they are doing particular work. Similarly, they will be automatically represented by a trade union with which they have no previous connection.

16. Mil-Dom has no continuing relationship with the Science Centre, and therefore no direct knowledge of its workings; however, Mil-Dom does not dispute the fact that the Science Centre has a shop with employees having similar skills to its own workers, or that those shop employees working for the Science Centre might in other circumstances have built the crates in question, and have built crates of that kind before. Counsel concedes that, in this sense, work which might have been done by Crown employees was done by Mil-Dom's workers. It is the same kind of work that Crown employees have done before, and we do not know why, in this instance, the Science Centre decided to "contract out" the work rather than have the crates built "in house".

17. It is clear, therefore, that Mil-Dom's employees were performing "*functions*" which were ordinarily undertaken by Crown employees in the ordinary course of their duties at the Ontario Science Centre; and, but for the "subcontract" to Mil-Dom, those employees would have

built the crates as they had done before. Crating exhibits is a “function” the Science Centre regularly does. We do not know the extent to which the Science Centre uses such subcontractors to supplement, or substitute for, the efforts of its own employees.

18. It is this “sub-contracting arrangement” which is the Union’s real concern. OPSEU views subcontracting as a loss of work opportunities which would otherwise accrue to the benefit of its members, and argues that if the work is done by another employer, the *Crown Transfers Act* requires that employer to recognize OPSEU as the bargaining agent for its employees, and to pay them (etc.) pursuant to the OPSEU collective agreement. For OPSEU, the work functions performed by its members are a critical “part” of the Crown’s “undertaking”. When those work functions are taken over by the employees of a subcontractor, OPSEU’s bargaining rights should follow “the work” - defined as the kind of job functions Crown employees customarily perform.

19. OPSEU relies upon a line of Board decisions beginning with *KBM Forestry Consultants Inc.*, [1987] OLRB Rep. March 399, July 1007, and *Charmaines Janitorial Services*, [1983] OLRB Rep. Sept. 871, which held that the “functions” performed by the Crown were a “part” of its “undertaking”, capable of being “transferred” within the meaning of the *Crown Transfers Act*. The “functions” of the Crown were defined in terms of the “work” that Crown employees customarily perform. If that “work” was undertaken by a subcontractor, OPSEU’s collective agreement follows the work, and binds the subcontractor and its employees.

20. OPSEU asserts that this is the test for a Crown transfer which the Board has recently endorsed, and, in fact, that is the underpinning of item 2 of OPSEU’s agreement with the Crown reproduced at paragraph 3 above. OPSEU submits that this agreement reflects the current state of the law, which defines the Crown’s undertaking in relation to the functions it performs and the work Crown employees do. Similarly, the declaration set out at item 4 of the agreement is the kind which the Board has typically and recently given under the *Crown Transfers Act*. OPSEU submits that the agreement was intended to avoid the necessity of a hearing, but, in any event, summarizes the result which flows from the established law as applied the facts of this case. Mil-Dom’s concurrence is not necessary.

21. OPSEU argues that the law in this area has been settled and followed quite recently, and it would be inappropriate to reconsider it now. The respondent replies that this analysis and its consequences were neither envisaged by the Legislature when the *Crown Transfers Act* was passed in 1977, nor compelled by the statutory language the Legislature actually used.

22. Having outlined the facts, and a brief summary of the parties’ positions, we now turn to legal and policy considerations.

• • •

[Paragraphs 23 to 169 have been omitted. See Parnell Foods Limited [infra, p. 1164] at paragraphs 61 to 204; Editor]

• • •

Decision

170. We are satisfied that, although the respondent Mil-Dom-Ex Packaging and its employees are performing “work” or “functions” formerly done by employees of the Ontario Science Centre, that arrangement does not constitute a “transfer” of “part” of the Crown’s “undertaking”, within the meaning of the *Crown Transfers Act*. What the respondent has “acquired”, is the right

to supply goods and services to the Crown, for a price, using its own tools, materials, equipment, employees, and know-how - in short, using its *own* undertaking. It has not acquired part of the Crown's undertaking. Having regard to the instrumental approach to which we have referred at length, there is no "Crown Transfer" on these facts.

171. This application is therefore dismissed; and in view of the Board's finding under section 2 of the *Crown Transfers Act*, it is unnecessary to consider the definition of the bargaining unit, whether there has been an "intermingling", or whether the "character" of the undertaking has been changed.

DECISION OF BOARD MEMBER CAROLE McDONALD; December 7, 1992

1. I have read the majority decision and with the greatest respect I must dissent in part.

2. This application is one of a number of cases currently before the Board as test cases for OPSEU in anticipation of a number of further applications. While I agree with the final decision of the majority, I would continue to follow the jurisprudence set out by the Board in *KBM* and the cases that followed.

3. The majority in this decision defines the mischief in *KBM* and *Charmaine* as the preservation of work opportunities enjoyed by Crown employees (#170, p.113). However, the majority in *KBM* did not deal with that issue and the majority in *Charmaine* came to the opposite conclusion:

We are of the view that the definition of [undertaking] in clause 1(1)(h) of the Act does not include the mere performance of labour in itself.

We conclude that the term [work] does not refer in itself to the exertion of labour and that *in and by itself* the performance of labour does not constitute an undertaking (#21 p.877).

4. At the same time, the Boards in *KBM* and *Charmaine* refused to require a transfer under the *Crown Transfer Act*. In doing so, however they did not completely discard the concept of "total business" or "functional economic vehicle". The Boards arrived at a point between the "mere performance of labour" and a "transfer of assets" which was a modified functional economic vehicle test which could be sensitive to the diversity of Crown undertakings. Each of the cases decided in the *KBM*, *Charmaine*, and *Dunning* constellation of cases found that a Crown transfer had taken place when the transferred work was conducted at a place of operations in which employees in the Crown bargaining unit would have ordinarily performed the work. This is an element of the business carried on by the Crown which can be sufficient in itself to identify a transfer which warrants a continuation of bargaining rights.

5. Here, the employees of *Mil-Dom-Ex*, though performing "work" or "functions" formerly done by employees of the Ontario Science Centre, have acquired nothing more than the opportunity to do the work. They have not acquired part of the Crown's undertaking.

0193-91-R; 0194-91-R; 0254-91-R; 0437-91-R; 0470-91-R; 0471-91-R; 0472-91-R; 0473-91-R United Food and Commercial Workers International Union ("UFCW"), Applicant v. **Parnell Foods Limited** ("Parnell"), Respondent v. Ontario Public Service Employees Union ("OPSEU"), Intervener; United Food and Commercial Workers International Union ("UFCW"), Applicant v. Nutritional Management Services ("Nutritional"), Respondent v. Ontario Public Service Employees Union ("OPSEU"), Intervener; Ontario Public Service Employees Union ("OPSEU"), Applicant v. Parnell Foods Limited ("Parnell"), Respondent v. Retail, Wholesale and Department Store Union, Local 414 ("RWDSU"), Intervener; Ontario Public Service Employees Union ("OPSEU"), Applicant v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services ("MCS") and Parnell Foods Ltd. ("Parnell"), Respondents; Ontario Public Service Employees Union ("OPSEU"), Applicant v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services ("MCS") and Parnell Foods Ltd. ("Parnell"), Respondents v. United Food & Commercial Workers International Union ("UFCW"), Intervener; Ontario Public Service Employees Union ("OPSEU"), Applicant v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services ("MCS") and Nutritional Management Services ("Nutritional"), Respondents v. United Food and Commercial Workers International Union ("UFCW"), Intervener

Abandonment - Bargaining Rights - Certification - Crown Transfer - Whether engaging subcontractor to provide on-site food services amounting to transfer of "undertaking" within meaning of Crown Transfer Act - Whether certification applications made by UFCW to represent employees of contractor barred - Whether certification application and application under Crown Transfer Act made by OPSEU defeated or barred by subsisting collective agreement between subcontractor and RWDSU - Board finding "transfer" of "part" of Crown's undertaking to subcontractor, but deciding that bargaining rights abandoned by OPSEU - Collective agreement between RWDSU and subcontractor operating as bar to OPSEU certification application - Certification applications made by UFCW granted - Certification application and crown transfer application made by OPSEU dismissed

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members J. A. Ronson and K. Davies.

APPEARANCES: A. Peters and Larry Fisher for UFCW; James G. Knight for Parnell; David Wright for OPSEU; Michael Fleishman for the Crown; Eric del Junco and Stanley Simpson for RWDSU, no one appearing for Nutritional Management Services.

DECISION OF R. O. MacDOWELL, ALTERNATE CHAIR, AND BOARD MEMBER J. A. RONSON; December 7, 1992

1. These are a series of certification applications which were heard together with related applications under the *Successor Rights (Crown Transfers) Act*. This proceeding is, in fact, part of a broader constellation of cases, all of which involve similar themes, so that it is convenient to release the decisions at the same time. The *Crown Transfers Act* includes these provisions:

1.-(1)(a) "bargaining agent" means an employee organization that has representation rights

under the *Crown Employees Collective Bargaining Act* or a trade union or council of trade unions that is certified as a bargaining agent under the *Labour Relations Act*;

• • •

- (f) “transfer” means a conveyance, disposition or sale;

• • •

- (h) “undertaking” means a business, enterprise, institution, program, project, work or part of any of them;

2.-(1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

• • •

4.-(1) Where an undertaking was transferred from the Crown to an employer or from an employer to the Crown and an employee organization, trade union or council of trade unions was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer and,

- (a) a question arises as to what constitutes a unit of employees that is appropriate for collective bargaining purposes in respect of the undertaking; or
- (b) any person, employee organization, trade union or council of trade unions claims that by virtue of section 2 or 3, a conflict exists as to the bargaining rights of the employee organization, trade union or council of trade unions,

any person, employee organization, trade union or council of trade unions concerned may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, and the Board or the Tribunal, as the case requires,

- (c) may determine the composition of the unit of employees referred to in clause (a);
- (d) may amend, to such extent as the Tribunal or the Board considers necessary,
 - (i) any bargaining unit in any certificate issued to any trade union or council of trade unions,
 - (ii) any bargaining unit defined in any collective agreement;
 - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of the undertaking, or
 - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of the undertaking.

(2) Where an undertaking is transferred from the Crown to an employer or from an employer to the Crown, any person, employee organization, trade union or council of trade unions may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown,

- (a) within sixty days after the transfer of the undertaking; or

- (b) within sixty days after written notice is given by the employee organization, trade union or council of trade unions of desire to bargain to make or renew, with or without modifications, a collective agreement,

and the Board or the Tribunal, as the case requires, may terminate the bargaining rights of the employee organization, trade union or council of trade unions bound by a collective agreement in respect of employees employed in the undertaking or that has given notice, as the case may be, if in the opinion of the Board or the Tribunal the transferee of the undertaking has changed the character of the undertaking so that it is substantially different from the undertaking as it was carried on immediately before the transfer.

5.-(1) Notwithstanding section 2, where an undertaking is transferred from the Crown to an employer who intermingles the employees employed in the undertaking immediately before the transfer with employees employed in one or more other undertakings carried on by the employer or an undertaking is transferred from an employer to the Crown and employees employed in the undertaking immediately before the transfer are intermingled with employees employed in other undertakings of the Crown and an employee organization, trade union or council of trade unions that is the bargaining agent in respect of employees employed in any of the undertakings applies to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, the Board or the Tribunal, as the case requires,

- (a) may declare that the employer or the Crown, as the case may be, is no longer bound by the collective agreement referred to in section 2 or 3;
- (b) may determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) may declare which employee organization, trade union or council of trade unions shall be the bargaining agent in respect of each such bargaining unit; and
- (d) may amend, to such extent as the Board or the Tribunal considers necessary,
 - (i) any certificate issued to any trade union or council of trade unions,
 - (ii) any bargaining unit defined in any collective agreement,
 - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of any of the undertakings, or
 - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of any of the undertakings.

(2) Where an employee organization, trade union or council of trade unions is declared to be a bargaining agent under subsection (1) and it is not already bound by a collective agreement with the successor employer in respect of employees employed in the undertaking that was transferred, the employee organization, trade union or council of trade unions is entitled to give to the successor employer written notice of desire to bargain to make or renew, with or without modifications, a collective agreement.

Section 5(1) of the *Labour Relations Act* provides:

5.-(1) Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees in the unit are not bound by a collective agreement, a trade union may, subject to

section 62, apply at any time to the Board for certification as bargaining agent of the employees in the unit.

What these cases are about

2. Each of these applications relates to a group of employees working at a provincial correctional institution run by the Ministry of Correctional Services. There are four correctional institutions involved: the Elgin-Middlesex Detention Centre ("Elgin-Middlesex"); the Maplehurst Correctional Centre ("Maplehurst"); the Metro Toronto West Detention Centre ("Metro West"); and the Guelph Correctional Centre ("Guelph"). The operation of these institutions is governed by the *Ministry of Correctional Services Act* which includes the following provisions:

3. The Minister is responsible for the administration of this Act and any Acts that are assigned to him by the Legislature or by the Lieutenant Governor in Council.

4. It is the function of the Ministry to supervise the detention and release of inmates, parolees and probationers and to create for such persons a social environment in which they may achieve changes in attitude by providing training, treatment and services designed to afford an inmate, parolee or probationer the opportunity for successful personal and social adjustment in the community, and, without limiting the generality of the foregoing, the objects of the Ministry are to,

- (a) provide for the secure custody of persons awaiting trial or convicted of an offence;
- (b) establish, maintain and operate correctional institutions;
- (c) provide programs and facilities designed to assist in the rehabilitation of inmates;
- (d) establish and operate a system of parole;
- (e) provide probation services; and
- (f) provide programs for the prevention of crime.

8.-(2) The Minister, for and in the name of the Crown, may enter into any contract or agreement that he considers advisable for the purpose of carrying out the provisions of this Act.

(3) The employees of the Ministry under the direction of the Minister or the Deputy Minister may enter into contracts or agreements for and in the name of the Crown to carry out the responsibilities of the Ministry under this Act.

3. One of the things that MCS must do is provide food for the inmates. It may do this either by using its own employees, or by engaging a subcontractor to provide on site food services. In each of these applications the workers affected are employees of a subcontractor that has been engaged by the MCS to operate what it describes as its "Food Services Program". The MCS invites tenders, and the food services contract is awarded to the successful bidder.

4. What is at issue at each of the four locations are the collective bargaining rights of the food service employees working for the subcontractors, and the rights of the unions claiming to represent them. More specifically, we are asked to determine:

- (a) which union is entitled to represent the workers at each location; and,
- (b) the legal foundation of those bargaining rights (certification under the *Labour Relations Act*, a collective agreement binding under the

Labour Relations Act, or pre-existing OPSEU bargaining rights extended to the subcontractor and its employees by a “Crown Transfer”).

5. OPSEU asserts that it has the right to represent these workers because, in each instance, there has been a transfer of an “undertaking” within the meaning of the *Crown Transfers Act*, with the result that the subcontractor is bound to recognize OPSEU’s collective agreement and bargaining rights. OPSEU asserts that on the transfer of a part of the Crown’s undertaking to an employer “in the private sector” (i.e. an employer covered by the *Labour Relations Act*), OPSEU’s bargaining rights follow automatically and attach to the employees of the subcontractor. On OPSEU’s analysis, the wishes of the employees are irrelevant. What counts is that they are doing “work” customarily performed by civil servants, and, in OPSEU’s submission, that is sufficient to establish OPSEU’s right to represent them, pursuant to the *Crown Transfer Act*.

6. But at three of the institutions - Maplehurst, Metro West, and Guelph - the UFCW has organized what it asserts were unrepresented employees. The UFCW enrolled those employees into membership at a time when OPSEU was not on the scene, and claims that it is entitled to certification as the employees’ bargaining agent.

7. At the fourth institution, Elgin-Middlesex, OPSEU has itself solicited membership support from the employees and filed both a certification application and an application under the *Crown Transfers Act*. At Elgin-Middlesex, however, RWDSU has intervened, claiming that the workers in question are already bound by its subsisting collective agreement with the subcontractor (Parnell) that covers, *inter alia*, the subcontractor’s business activities in Guelph. In Western Ontario, Parnell is a “unionized” contractor; and RWDSU asserts that the extension of Parnell’s business to a Crown customer should not circumscribe or eliminate pre-existing bargaining rights established under the *Labour Relations Act*. Parnell’s unionized employees continue to be represented by RWDSU regardless of who Parnell’s customers may be from time to time, and, in this instance, regardless of the fact that the Crown has become a customer.

8. The details of the various applications can be set out by institution, as follows:

Maplehurst (Milton)

At Maplehurst, the subcontractor is *Parnell*. On April 15, 1991 the UFCW applied for certification as the bargaining agent for the employees at Parnell working at Maplehurst. In support of this application for certification, the UFCW tendered membership cards signed by the vast majority of those employees. *Prima facie*, therefore, the UFCW appears to be entitled to certification if only *Labour Relations Act* rights were in question. But OPSEU has intervened, asserting that OPSEU already has bargaining rights, and that the workers are already bound by an agreement with OPSEU that Parnell “inherited” from the Crown pursuant to the *Crown Transfers Act* when Parnell entered into its contractual relationship with the Crown. There is no evidence that any of the employees at Maplehurst are members of OPSEU or that OPSEU has ever previously purported to represent them (see *infra*). UFCW replies that there has been no “transfer” of an “undertaking” to which the *Crown Transfers Act* applies, and even if there was, OPSEU has long ago abandoned any bargaining rights which it may have had for these employees.

Guelph Correction Centre (Guelph)

At the Guelph Correction Centre, the subcontractor is *Nutritional Management Services* ("Nutritional"). On April 19, 1991 the UFCW filed an application for certification seeking to represent all employees of Nutritional in Guelph - which would include those working at the Guelph Correctional Centre. In support of that certification application, the UFCW filed membership cards on behalf of all those whom it claimed were employees working for Nutritional (i.e. one hundred per cent membership support). Nutritional does not oppose this certification application; so, in this case, the only impediment to the UFCW's certification is OPSEU's intervention. As at Maplehurst, OPSEU asserts that when the subcontractor - here Nutritional - signed its agreement with the Crown there was a Crown transfer, so that Nutritional inherited the Civil Service collective agreement that OPSEU had with the Crown. Again, there is no evidence that any of the employees in question are members of OPSEU, or that OPSEU has ever previously purported to represent them (see *infra*). Once again, UFCW claims that there has been no "transfer" of an "undertaking" to which the *Crown Transfers Act* applies; and, even if there was, OPSEU has long ago abandoned its bargaining rights.

Metro West (Rexdale)

At the Metro West Detention Centre, the subcontractor is *Parnell*. On April 15, 1991 the UFCW applied for certification as bargaining agent for the employees of Parnell working at this site. In support of its application for certification, the UFCW tendered membership cards on behalf of all of the employees which, it said, were working at this site. *Prima facie*, it appears that the UFCW is entitled to certification if only *Labour Relations Act* rights were in issue. On May 9, 1991, OPSEU intervened asserting that it already had bargaining rights for these workers and that Parnell was already bound by an agreement with OPSEU that Parnell "inherited" from the Crown pursuant to the *Crown Transfers Act* when Parnell consummated the subcontract with MCS. There is no evidence that any of the employees in question are members of OPSEU, or that OPSEU has ever previously purported to represent them (see *infra*). UFCW claims that there is no transaction to which the *Crown Transfers Act* applies; and even if there was, OPSEU has long ago abandoned its bargaining rights.

Elgin-Middlesex Detention Centre (London)

At the Elgin-Middlesex Detention Centre the subcontractor is *Parnell*. On May 8, 1991 OPSEU itself applied for certification as bargaining agent of the employees of Parnell working at the Centre. In support of that application, OPSEU tendered seven membership cards on behalf of the seven employees it claimed worked there. *Prima facie*, therefore (i.e. having regard only to this membership evidence), OPSEU would appear to be entitled to certification under the *Labour Relations Act*. However, on May 10, 1991 OPSEU also filed an application under the *Crown Transfers Act* in respect of these same employees, asserting that there had been a transfer of an undertaking from the Crown to Parnell with the result that OPSEU was already the bar-

gaining agent for the workers in question and those workers were already bound by the Civil Service collective agreement that Parnell "inherited" from the Crown pursuant to the *Crown Transfers Act*. OPSEU acknowledges that these pleadings are inconsistent. In both of these OPSEU applications, RWDSU has intervened, asserting that the employees are already bound by a subsisting collective agreement between RWDSU and Parnell (i.e., a collective bargaining relationship predating both OPSEU applications and the Parnell subcontract to provide services at Elgin-Middlesex). That collective agreement covers a number of Parnell's employees in Western Ontario business locations, including: London, Ingersoll, Woodstock, Sarnia, Chatham, Windsor, Tillsonburg, St. Thomas, St. Mary's, Strathroy, Aylmer, Blenheim, Hanover, Owen Sound, Goderich and adjacent townships. RWDSU contends that this collective agreement covers all of Parnell's workers in these locations and therefore automatically binds those employees who work for Parnell in the Elgin-Middlesex Detention Centre once Parnell has employees working on that location. The RWDSU collective agreement covers employees working in Parnell's western Ontario business - including those now servicing its new customer Elgin-Middlesex Detention Centre. OPSEU acknowledges that this RWDSU agreement would be a bar to its certification application, but maintains that its rights under the *Crown Transfers Act* are paramount.

9. MCS operates some fifty correctional institutions across the Province. Catering services are "contracted out" at nine institutions - including the four here under review. At the remaining institutions, food services are provided directly by MCS using its own employees. Those employees are civil servants, represented by OPSEU, and bound by the Civil Service collective agreement. Civil servants customarily do the kind of work now being done by the respondents' employees pursuant to their commercial contract with the Crown.

10. At the four institutions involved in these proceedings, catering services have been contracted out for many years to various food subcontractors. There is no evidence that, at these locations, food services have *ever* been provided by MCS employees represented by OPSEU.

11. In the case of Metro West, food services have been provided by an outside company and its employees since at least 1976. In the case of Maplehurst, food services have been supplied by an outside company and its employees since at least 1974. In the case of Elgin-Middlesex, food services have been provided by an outside company and its employees since at least 1977. In the case of the Guelph Correctional Centre, food services have been provided by an outside company and its employees since at least 1978.

12. The subcontractors have changed from time to time in accordance with the competitive bidding process to which we have already referred. There is no pattern. Sometimes the caterer will be able to successfully keep the contract for several years. Sometimes there is more frequent changeover. Sometimes the subcontractor is "unionized", like Parnell. Sometimes it is not. In all cases, the subcontractor selects its own employees to deliver the services it has contracted to provide. And, not only is there no evidence that these services have *ever* been provided by MCS employees at these locations, but over the years, OPSEU has *never* asserted that the employees of any of these subcontractors were really "Crown employees", or that the subcontractors were "Crown agencies" or that OPSEU represented any of these workers pursuant to the provisions of the *Crown Transfers Act*, or otherwise. Subcontractors have changed and employees have come and gone, but OPSEU has never before asserted bargaining rights.

13. At institutions where MCS does not contract out catering services, MCS employs persons who perform virtually identical job duties, and are employed in the same job classifications as the individuals employed by Parnell or Nutritional. OPSEU has had a collective agreement with the Crown continuously since 1977. This collective agreement applies to a bargaining unit covering the whole of the Ontario Public Service, excluding only individuals specified in section 1(1)(f) of the *Crown Employees Collective Bargaining Act*. The bargaining unit includes workers employed by MCS to provide catering services at the correctional institutions where those services are not provided by an outside subcontractor.

14. Officers of the OPSEU locals at the four institutions here in issue, have had knowledge of the contracting of catering services at their institutions throughout the period for which those services have been contracted. However, as we have already mentioned, OPSEU never sought to represent the employees of the subcontractors engaged from time to time. OPSEU never sought to bargain on behalf of those employees, and never sought to apply its collective agreement to those employees. OPSEU never sought to organize them, or enrol them into membership in OPSEU or apply for certification. OPSEU never raised any legal claim to be their bargaining agent. These workers were either unrepresented or were represented by a trade union other than OPSEU. Their terms and conditions of employment were determined either by individual bargaining with their employer, or collective bargaining through a bargaining agent other than OPSEU.

15. We might observe, parenthetically, that OPSEU does, in fact, represent employees of this kind "in the private sector" - that is, under the *Labour Relations Act*. OPSEU is a statutory bargaining agent representing Crown employees under the *Crown Employees Collective Bargaining Act*, and the *Colleges Collective Bargaining Act*; however, it is also a "trade union" under the *Labour Relations Act* that has organized large groups of employees to whom that statute applies. Despite its name and main membership base, OPSEU's membership is not limited to civil servants or Crown employees. It represents numerous other diverse groupings of workers, in what may be loosely described as the "public sector". For example, it is a matter of Board record that OPSEU obtained bargaining rights for by certification for the employees of VS Services Ltd. ("VersaFood" - Parnell's corporate parent) at the Great War Memorial Hospital in Perth, Ontario, at St. Clair College of Applied Arts and Technology (a "Crown agency"), and at the Prince Edward Heights Mental Retardation Facility. There, as here, food services at the institution have been contracted out - thereby creating a grouping of the subcontractor's employees who become the target of an organizing/certification effort (there by OPSEU, here by UFCW). The provision of institutions food services is not a function unique to the Crown or its agencies, nor is there anything intrinsically "governmental" about cafeteria services or the skills of cafeteria workers.

16. To put these issues in further perspective, we should note that the workers providing food services at Guelph were once represented by the UFCW - the same union which now seeks to represent the Nutritional employees currently working at Guelph. That history provides an interesting backdrop for the current proceedings, because it involves the exercise of rights under the *Labour Relations Act* at one of the locations where OPSEU now seeks to preclude the same exercise of rights.

17. In 1984, Domco Food Services Limited held a catering contract at Guelph. That contract ran from 1982 to 1984. UFCW organized Domco's employees and in May 1984, the Ontario Labour Relations Board certified the UFCW as the bargaining agent for the employees of Domco working at the Guelph Correctional Institution. OPSEU did not intervene (as it has done this time) nor otherwise challenge UFCW's right to represent the employees it had organized.

18. In the fall of 1984, the food services contract at the Guelph Correctional Centre was put

out to tender. Versa Foods was the successful bidder; and when Domco lost the contract, it withdrew its presence from the site. For practical purposes, the UFCW lost its bargaining rights for the employees then working there.

19. Of course, the UFCW still retained the legal right to bargain on behalf of all Domco employees in Guelph, so if Domco got the contract again and its employees returned to the Guelph site, UFCW would represent them. But for practical purposes, this part of the UFCW's bargaining unit was empty. Since there were no Domco employees at the Guelph Correctional Centre, there was no UFCW presence either.

20. In an effort to retain bargaining rights for the food service workers at the Guelph Correctional Centre (i.e. extend those rights to the Versa Foods employees who came to be situated there), UFCW filed an application under section 63 [now 64] of the Ontario *Labour Relations Act*, contending that there had been a "sale of Domco's business" to Versa Foods. The Board dismissed that application, holding that there had been no "disposition" of a "business or part of a business" as between Domco, the unsuccessful bidder and Versa Foods, the successful bidder. The Board said this:

2. This is an application under section 63 [now 64] of the *Labour Relations Act*. The applicant claims that Domco Foodservices Limited ("Domco") has "transferred" its "business" to V. S. Services Ltd. ("V.S.") within the meaning of section [64] and that, accordingly, the union retains bargaining rights for the employees of V.S. and V.S. is bound by an existing collective agreement between the union and Domco.

3. A hearing in this matter was held in Toronto on October 11, 1984. The facts were not in dispute, and it is unnecessary to recite them at any length. It suffices to say that Domco had a two-year contract with the Ministry of Correctional Services to provide food services at the Guelph Correctional Centre. The contract prescribed the services in some detail and, as might be expected, in carrying out its duties and responsibilities, Domco had to follow the policies, procedures, and regulations, determined by the Ministry and administered by the superintendent of the correctional facility. Domco was first engaged to provide these catering services in or about 1978. Its current two-year contract was slated to expire on September 1, 1984. On April 18, 1984, the union was certified (on an interim basis) to represent the employees of Domco working at the Guelph Correctional facility. A final certificate issued on May 24, 1984. On July 17, 1984, the union and Domco executed a document entitled "Memorandum of Agreement", which is said by the union to constitute a valid and binding collective agreement.

4. In accordance with the Ministry's established practice, the food service contract was put out for competitive tender in July, 1984. Sealed tenders were to be received by the Ministry no later than July 17, 1984. Domco submitted a bid, as did V.S. and several other catering contractors. V.S. was the successful bidder. By letter dated July 30, 1984, Domco advised its employees that it had lost the contract and that accordingly it was necessary to terminate their employment, effective August 31, 1984.

5. V.S. was scheduled to take over the operation on September 1, 1984. Early in August it approached John Sheehan, the on-site manager for Domco, and offered him continued employment. Mr. Sheehan had only worked for Domco for about ten months, but he was familiar with the site and had extensive experience in the food service business. He had worked for V.S. at the Mimico Correctional Centre for four years, and subsequently he was food service director at a private hospital in Toronto. After that, he spent about three years in business for himself running two restaurants. Thus, although his tenure with Domco had been short and his responsibilities limited, V.S. decided to hire him. V.S. acquired the remainder of its staff through interviews with Domco's former employees and advertisements in the local newspaper. V.S. hired seven of the approximately thirteen individuals formerly employed by Domco. There was no acquisition or transfer of anything from Domco. Indeed, in the tendering process, the rules specifically prohibited any contact between competitors, and there was none. Nor was there any need for such communication following the selection of the successful bidder. V.S. is an established catering contractor with hundreds of contracts across Canada and its own management

control systems which it began to implement at Guelph within the framework of the requirements and regulations stipulated by the Ministry.

6. We do not think it is necessary to dwell upon the evidence. The fact is, that the situation in this case is virtually identical (and legally indistinguishable) from that before the Board in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193. That case also involved a subcontracting arrangement (there with the federal government), and because the issue was somewhat novel, the Board engaged in an extensive analysis of the legal principles applicable in potential successor employer situations. The Board decision was unanimous and its approach has been consistently followed in later cases. On May 7, 1984, the Canada Labour Relations Board issued its decision in *Cafas Inc. v. International Association of Machinists and Aerospace Workers, Local 2300*, 84 CLLC ¶16,034 which quoted extensively from *Metropolitan Parking Inc.* and adopted its reasoning. The *Cafas* case also involved an alleged "sale of a business" when a unionized company providing services to a customer, lost a contract by tender to a non-union competitor. As in *Metropolitan Parking Inc.*, the Canada Labour Relations Board held that there was no "sale of a business".

7. No useful purpose would be served by repeating, in these reasons, the analysis outlined by the Board in *Metropolitan Parking Inc.*. It is sufficient to say that we reaffirm that analysis, and for these reasons, this application must be dismissed.

We shall return below to the Board's approach to successorship in *Metropolitan Parking Inc.*

21. Throughout the course of these events, no one made any application under, or references to, the *Crown Transfers Act*. OPSEU took no part in any of these proceedings (certification, successor rights), although notice of them would have been posted on the premises of the institution. Accordingly, UFCW's present certification application can be viewed as an effort to re-establish bargain rights similar to those which it held some years ago - albeit, in respect of the employees of a different subcontractor. Thus, UFCW asks, rhetorically, "where was OPSEU"; and "why did it never seek to represent workers whom it now claims to have represented all along?"

22. Sherrie Currie, an OPSEU official, provided an explanation for OPSEU's inactivity at the four detention centres.

23. Ms. Currie has been an employee of OPSEU since 1986, and is currently the Acting Coordinator of Organizing. Ms. Currie explained that prior to several decisions by this Board in 1988-1989 (see for example: *Charmaine's Janitorial Services*, [1988] OLRB Rep. Sept. 871; *Dunning Paving*, [1989] OLRB Rep. July 714 and [1989] OLRB Rep. Oct. 1028; *Agassi Forestry/Environmental Services*, [1990] OLRB Rep. June 633; following the first in the series *KBM Forestry Consultants Inc.*, [1987] OLRB Rep. July 1007), no one at OPSEU ever believed that the *Crown Transfers Act* (passed in 1977) had any application to "subcontracting arrangements" of the kind here under review. Earlier cases involving the "privitization" of institutions run by the Crown did not, and could not reasonably signal that result. Thus, when the Board ruled that subcontracting arrangements involving a "transfer of work" might be "Crown transfers" binding the subcontractor to the OPSEU collective agreement, OPSEU was faced with the enormous task of applying this "new law" to literally hundreds of commercial contracts which the Crown had entered into with subcontractors over the years; moreover, it was not at all clear how far the principles enunciated by the Board could or should be extended, how the civil service collective agreement could be applied in the new private sector environment, or how the OPSEU bargaining rights declared by the Board under the *Crown Transfers Act*, meshed with the existing employee or collective bargaining relationships of the transferee. These practical collective bargaining consequences were not addressed in the Board's decisions, and posed significant tactical problems for OPSEU, whose legal theory had prevailed.

24. Ms. Currie testified that in light of these legal developments, OPSEU formed a head office team to investigate and catalogue the multitudinous subcontracting arrangements which were now arguably subject to the *Crown Transfers Act* and had the effect of extending OPSEU's bargaining rights to groups of employees whom OPSEU had never previously considered representing. According to Ms. Currie, there was a huge backlog, and an ongoing effort to investigate and prepare "test cases" - of which the current applications are an example (there are many others). It was impossible to probe all of these commercial arrangements, and inevitable that a large number would escape immediate consideration. Ms. Currie noted that in 1988 alone, OPSEU filed with the Board at least one hundred Crown transfer applications, which she described as "just the tip of the iceberg".

25. Ms. Currie confirmed that OPSEU officials at the local level were aware of many of the subcontracting arrangements over the years. Often, as here, the subcontractor's employees had to work in co-operation or conjunction with civil servants employed by a Ministry. But since there was no reason to believe that OPSEU had or could assert bargaining rights for the employees of a subcontractor under the *Crown Transfers Act*, there was no reason to explore these relationships. On the other hand, once the legal arguments had been identified, it was a mammoth task to determine their application, and quite a number of subcontracting arrangements were simply not pursued. In the instant cases, it was the UFCW's certification applications which brought these particular situations to the attention of OPSEU's head office, and prompted it to take action.

26. However, in at least one institution - Maplehurst - there is direct evidence that OPSEU remained indifferent to the employees of the subcontractor even though these employees actually approached OPSEU, and urged OPSEU to seek bargaining rights on their behalf.

27. Joan Hall is a Head Cook at Maplehurst. In about October 1990, she contacted an OPSEU official at Metro West and told him that the employees at Maplehurst wanted to be represented by OPSEU. Her inquiry was directed to OPSEU's head office. The head office official to whom she spoke requested a list of employees and advised Ms. Hall that she would be contacted. A list was sent to OPSEU about November 1990 but Ms. Hall learned nothing more for several months.

28. Eventually, Ms. Hall was advised that there were problems contacting OPSEU organizers. Later she was advised that there were difficulties seeking certification for the food service workers because they were not "guards". This information was obviously wrong (as demonstrated by the certificates which OPSEU obtained for the employees of Parnell's parent company); however, there is no reason to doubt that this is what Ms. Hall was told. In any event, OPSEU did nothing.

29. By about April 1991 it appeared that OPSEU was not going to act, so the employees approached the UFCW which was urged to seek certification as their bargaining agent. The UFCW certification application was filed a few weeks later; and, as we have already mentioned, it is that application that provoked OPSEU's intervention, claiming that it already had bargaining rights. Ms. Hall's evidence is cited in support of UFCW's reply that OPSEU abandoned any rights it might have had.

* * *

30. There is very little information about the business activities of Nutritional, which did not take an active part in the proceedings. But there is quite a lot of information about the business history and activities of Parnell.

31. In 1954, Parnell Foods Limited began operating in the food service industry in and around London, Ontario, distributing refreshments and lunches to offices and industrial accounts by mobile refreshment vehicles. Over time, the company began to expand, and soon operated a number of cafeterias and vending accounts, in addition to its mobile operation. There were various changes in the corporate ownership which are not here relevant; and, in October 1984 Parnell Foods (1981) Limited became a wholly-owned subsidiary of VS Services Limited ("Versa Foods"), a major food service company. Parnell continues to operate as a separate entity under the control of the management in place at the time of the sale to Versa Foods.

32. Parnell Foods Limited now operates the food service requirements of various private businesses and industrial accounts, along with retirement homes, schools, colleges and correctional institutions. Parnell's clientele includes such firms as: Northern Telecom Canada Limited, Algoma Steel Corporation Limited, The Ford Motor Company, and Seneca College. In addition, Parnell operates vending machines and food production kitchens. Parnell describes itself this way:

"Parnell Foods Limited is a food service company providing a high degree of personal involvement by all employees. It is our philosophy that we regard service to be of paramount importance for all of our clients, while giving equal consideration to the quality, variety, preparation and presentation of the food items produced. Our trained supervisory representatives, as well as our senior management personnel, make regular and methodical inspections of every Parnell operation to ensure that each client account receives the high standard that is demanded by Parnell Foods Limited".

33. It is apparent that Parnell is an active "player" in the food service/catering market in the London area and in Ontario generally. As noted, Parnell is a subsidiary of VS Services Limited which, in turn, is one of the largest such companies in Canada, with 15,000 full-time employees (including those employed through its subsidiary Parnell) and 186 bargaining units with approximately 20 different trade unions. Unlike the respondents in some of the earlier Crown transfer cases, Parnell (and Versa Foods) is a significant business organization with numerous commercial interests, customers and arrangements, well beyond the three institutions here under review. Parnell is an active business in a competitive market which includes other firms supplying similar services; moreover, trade unions have been active in organizing the employees of those businesses - as OPSEU did in the institutions mentioned above, as the RWDSU has done, and as the UFCW is trying to do at Maplehurst, Guelph and Metro West.

34. In this industry, unions can acquire bargaining rights on a site-specific basis, then attempt to extend those bargaining rights more broadly, to embrace a company's activities in larger geographic areas, so that employee rights will be less vulnerable to the loss of a particular contract or account. That is what RWDSU has done here, with a collective agreement with Parnell that covers much of Western Ontario. These extended area collective agreements recognize the fluid nature of the employer's business, and respond to that reality, from an employee perspective, with broader-based transfer provisions, job posting arrangements, and so on.

35. In this regard, therefore, the UFCW has applied for what has become a "standard" bargaining unit in this industry; and, if it acquires bargaining rights at a number of locations, it will no doubt seek to negotiate an umbrella collective agreement, as the RWDSU appears to have done. (The RWDSU master agreement appears in Appendix "N" of the parties' agreed statement of fact and list of documents).

* * *

36. We do not have any evidence about how Parnell (or Nutritional) conducts its business at other locations, or with "customers" other than the Crown. But the commercial documents pro-

vide a useful overview of the nature of the services provided, and the manner in which they must be provided, in the rather unique environment of a secure correctional facility.

37. For ease of exposition, we will refer only to the tender documents and contract respecting the Elgin-Middlesex Detention Centre. The situation at the other institutions (detailed in Appendices "D-M" of the agreed list of documents) appears to be analytically similar. In any event, none of the parties argues that the legal relationship between the Crown and subcontractor differs from institution to institution or, to put the matter another way, that differences in detail in the particular commercial contract, should result in a different disposition of these applications.

38. The invitation to tender document for the Elgin-Middlesex Detention Centre contains a brief description of the institution and an overview of the Crown's needs:

INTRODUCTION

The Ministry of Correctional Services invites tenders from food service management firms to provide the staffing and management of the food service program at the Elgin-Middlesex Detention Centre, London, Ontario, the Ministry providing the supplies, facilities and equipment.

The Elgin-Middlesex Detention Centre is a maximum security facility with a capacity of 312 adult offenders and 36 young offenders. Offenders at this facility generally serve short sentences and/or are on remand awaiting trial.

The count can vary considerably because of the going and coming to and from court and because of frequent admissions and discharges.

A brief description of our requirements is as follows:

The Caterer is required to provide a competent manager for the program, all the necessary professional staff and to use inmates from the Elgin-Middlesex Detention Centre to fill positions for on-the-job training, with the possibility of apprenticeship training.

Subject to the Ministry requirements, the caterer is to assume the day to day responsibilities to provide planning, direction, monitoring and supervision of all food service operations, in the Elgin-Middlesex Detention Centre.

The caterer is responsible for complete food production systems including formulas and portion control (as required or specified by the Ministry from time to time); for the selection, hiring, dismissal, training, and scheduling of personnel; for the financial management of the program including the provision of appropriate regular reports; and the development, recommendation, and monitoring of the operating budget. The Ministry is responsible for financial reimbursement to the Caterer of an amount equal to the necessary expenditures as specified in the contract.

In carrying out its duties and responsibilities, the successful Caterer shall conform with the policies, procedures, and regulations as determined by the Ministry and administered by the institution which is under the direct jurisdiction of the Superintendent, Elgin-Middlesex Detention Centre or his designated official; and the quality of food service shall meet the requirements of the Ministry.

[emphasis added]

39. Potential tenderers are invited to visit the correctional facility to familiarize themselves with the premises and the proposed method of operations. The contract is for a two-year period with an option to renew for a third year commencing on or about December 1, 1990. The contract can be terminated by either party on giving sixty days' notice. The specifications include this background information:

A. Background Information

The Elgin-Middlesex Detention Centre is located at 711 Exeter Road, off Highway 135 in the city of London (turn off 401 at Wellington Road - interchange 20) proceed north 150 yards - turn left at stop light, and proceed to next stop light, turn to left on to Ontario Government property, turn right at the next intersection and follow the Perimeter Road to the Detention Centre.

The Elgin-Middlesex Detention Centre is a maximum security facility with a capacity of 312 adult offenders and 36 young offenders. Offenders at this facility generally serve short sentences and/or are on remand awaiting trial.

Food is portioned in the kitchen and sent in carts to the units on each floor and to the hospital and detention areas.

There is a dining room for staff adjacent to the kitchen. Maximum number of staff to be served at the noon meal will be 50, and about 36 at the other meals. There may be occasional visitors. The staff dining room is a cash register operation.

The Correctional Officers are responsible for serving food to the inmates in the units.

The Food Service Staff will be provided with a count of the number of inmates meals required for each unit.

Late meals are often required for late returnees from court or TAP (temporary Absence Program) or for new admissions.

In addition to providing high quality food services at the Centre, the Ministry requires that adequate on-the-job training and possibly apprenticeship training be provided to the Inmates of this institution.

It is required that most food be cooked on the premises. Some exceptions could be approved by the Superintendent.

It is required that the Ministry menu be followed as closely as possible so that:

- (a) The inmates receive a nutritionally adequate diet.
- (b) The inmates in Elgin-Middlesex Detention Centre will receive meals similar to those received by inmates in other Correctional Services Institutions through the province.

Note: For tendering purposes, the 1989 winter menu is attached (see page 23).

It is the practice of the Ministry to change menus twice a year.

B. Detailed Specifications

Detailed specifications for the desired Food Services and inmate training program are outlined in Schedule B, C, D, E, F, and G annexed hereto.

40. The service specifications set out in Schedules "B-G" are exceptionally detailed. They define and prescribe the respective responsibilities of the contractor and MCS, which, in turn, helps identify just what it is that the subcontractor brings to the relationship, and is paid for. The Ministry's responsibilities include the following:

MINISTRY RESPONSIBILITIES

5. *FACILITIES*

- (a) The Ministry shall provide all plant, equipment, furniture and utensils, and the tableware necessary for the operation of the food service.
- (b) With regard to furniture, fittings and fixtures, and kitchen equipment, the Ministry shall maintain and replace these at its own expense in good order and condition save for loss or damage caused by the negligence or carelessness of the Caterer, its employees, agents or tradesmen.
- (c) With regard to the tableware, glasses and general utensils, the Caterer shall request the Ministry to replace them, as required, when worn out through the effluxion of time, discoloured or damaged through ordinary wear and tear, and the cost of such replacements, shall be borne by the Ministry save for the provision in (b) above.

6. SUPPLY OF HEAT AND ELECTRICITY

The Ministry shall supply, without charge, all necessary water, heat and electrical power for the operations.

41. The caterer and the Ministry share responsibility for cleaning the areas where the caterer's employees work. The Ministry supplies all cleaning materials and is responsible for removing garbage. The Ministry provides cleaning services for the dining rooms, and the caterer is responsible for daily cleaning of the kitchen, dining room and storage and preparation areas. The Ministry reserves the right to inspect the premises and, presumably, would report any deficiencies, and require their correction.

42. The MCS does not rely upon the caterer to select, purchase or supply the food, beverages, or related material necessary to provide the "catering service" which the subcontractor undertakes to deliver. Item 9 of the tender contract reads:

9. SUPPLIES - FOOD AND CLEANING

The Ministry will purchase and supply to the Caterer all supplies which will include food, beverages, kitchen linen, cleaning supplies, paper goods and related items. The Catering Manager will list his/her requirements and present his/her list to the Office Manager at Elgin-Middlesex Detention Centre at appropriate times as designated by the Office Manager.

The Ministry reserves the right to check all inventories and the caterer is responsible for maintaining an inventory system.

43. The caterer's responsibilities are described this way:

11. CATERER'S RESPONSIBILITIES

The Caterer shall be responsible for providing services at the Elgin-Middlesex Detention Centre as generally outlined below:

- (a) The Caterer shall provide the professional management and the necessary staff for the authorized food services.
- (b) The Caterer with respect to the operation of Food Services shall adhere to portion, quantity and quality standards as specified by the Ministry from time to time, and as generally set forth in Schedule 'D' and 'E' attached hereto.
- (c) The Caterer shall follow the Ministry menus as closely as possible providing 3 meals a day, plus evening snack and beverage. The menu is subject to change by the Superintendent.

- (d) The Caterer shall prepare Special Diets as required.
- (e) The Caterer shall prepare packed lunches for inmates going out on T.A.P. (Temporary Absence Program) and for inmates attending out of city court appearances as requested by the Superintendent.
- (f) The Caterer shall prepare special meals for visiting groups or special services at the request of the Superintendent.
- (g) The Caterer shall observe the following basic meal hours.

Breakfast	06:45 to 07:45 hours -
Lunch	11:30 to 13:30 hours -
Dinner	16:30 to 18:00 hours -

(The evening refreshment for inmates is prepared and left for the correctional staff to serve later). In addition to the above hours, the Caterer shall arrange with the Superintendent or his designated official, working hours that will enable it to provide as effective and efficient operation as is possible. Kitchen will be open approximately from 05:30 to 19:00 hours.

The cafeteria will be open 10:00 to 18:30 hours.

- (h) Food is portioned in the kitchen and sent in carts via the elevator to the floors.
- (i) The Caterer's staff is required to operate a training program for a maximum of 11 inmates in conjunction with the food service program. The inmate trainees will come under the direction of the Caterer's Manager. Some inmates will be trained in job skills such as cleaners or short order cooks.

The manager is asked to consider all inmates referred to him by the Superintendent or his designate, for work in the kitchen area. It is agreed and understood that all inmates who will be referred shall be screened by Ministry personnel. It is further agreed and understood that the manager need only accept those inmates whom he deems suitable.

- (j) The Caterer will ensure the maintenance and the cleanliness and good order of the kitchen and storage areas and equipment contained therein. The Caterer will be responsible for sanitary food handling practices of all those who work in these areas.

44. Should the caterer wish to use additional equipment or utensils, it may do so after obtaining permission from the superintendent of the correctional facility. The caterer is required to provide work clothing, including safety shoes. However, the Ministry reserves the right to approve all such work clothing and reimburses the caterer for that cost. The caterer also undertakes these obligations:

15. PROVIDING OF PERSONNEL, LICENCES AND PERMITS

The Caterer with respect to its subject operations shall:

- (a) On the behalf of the Ministry, manage and operate the food services, and in relation thereto, provide all necessary personnel, supervision and accounting and give due consideration to any suggestions from the Ministry concerning such management and operations.
- (b) Hire all employees and they shall be the employees of the Caterer and not of the Province of Ontario; but all such employees shall be subject to Ministry's approval.

- (c) Take proper care of the facilities and fixed and loose equipment.
- (d) Comply with all statutes, regulations, by-laws, requirements and directions of the Dominion, Provincial or Municipal Governments that may be applicable to the carrying on of its business. The Caterer will, at his own cost, secure all necessary licences and permits that may be required, and will promptly pay all taxes assessed against the subject operations and all such costs from part of his legitimate management expense that shall be reimbursed by the Ministry.
- (e) Allow authorized representatives of the Government to examine the premises or to view the state of repair of such premises, and, in connection therewith, to make such repairs as the Ministry deems necessary, provided, however, that such rights of entry and such repairs shall be exercised and made at such times and in such manner as will not unreasonably interfere with the use of the premises or with the conduct of the business of the Caterer.
- (f) Comply with and cause its employees and inmates working in the kitchen to comply with all security and other rules and regulations made by the Ministry.
- (g) Comply with the terms of the Workers' Compensation Act of the Province of Ontario, and with any other applicable legislation, including Ministry of Correctional Services and regulations thereto.

45. The caterer must maintain liability insurance and indemnify the Crown in respect of any losses, *inter alia*, flowing from the activities of the caterer's employees. The caterer is entitled to use the institutional facilities only for the benefit of the individuals in the Ministry's care, employees of the Ministry and other individuals authorized by the Crown. If used for any other purpose without prior written consent of the superintendent of the institution, there is a defined breach of contract which entitles the Ministry to terminate the agreement forthwith.

46. The Crown retains the right to audit the caterer's financial records, including its receipts, costs, payrolls and disbursements at the institution and must provide such additional accounting reports as the Ministry may specify. All necessary maintenance, repairs and redecoration must be performed by the Ministry, and if the damage is attributable to misuse of the equipment by the caterer's employees, such repairs will be undertaken at the expense of the caterer. The caterer must adhere to fire and safety regulations and must generally "adhere to standards of food and services consistent with the standards of the Ministry". In other words, the Ministry reserves the right to define and prescribe the standards of food and services which are to be delivered pursuant to the agreement.

47. Despite the stipulation (*supra*) that the caterer is responsible "... for the selection, hiring, dismissal, training and scheduling of personnel...", the caterer is not completely free in the selection of its employees. In each invitation to tender, the Ministry specifies the number of persons who must be employed by the successful bidder and the positions which those persons are to occupy. The positions are identified according to the Ministry's system for classifying positions. The caterer's employees must undergo security checks and carry identification cards. The contract also contains this limiting clause:

27. LIMITING CLAUSE

The Caterer shall be required to adhere to the Operating Costs, as submitted and referred to in his tender (Schedule 'A'). Adjustments may be permitted for special circumstances. Such adjustments shall only include overtime for staff and shall be per-

mitted only when authorized in advance, in writing, by the Superintendent. Accounting for such adjustment shall be in accordance with Schedule 'G', page 36.

Note: Overtime incurred because of staff resignations, illness or vacations shall not be considered as additional legitimate adjustments.

The scheduling of hours of work or overtime - ordinary prerogatives of an employer - cannot be undertaken (or at least charged) without the advance authorization of the superintendent of the institution.

48. The agreement cannot be assigned without the written authorization of the MCS, nor can the ownership of the caterer (shareholdings, etc.) change without a "deemed transfer" of the subcontract which either requires MCS consent, or provides a basis for terminating the agreement forthwith. The tender submission must be accompanied by a written proposal in these terms:

26. TENDER SUBMISSIONS

...

2. A written proposal by the Caterer setting out all details of the proposed operation of the facilities, with detailed descriptions of the proposed civilian organization, work duties and training programs and management fee costs. He shall also include a list of classifications of staff to be employed with salary/wage rates for each classification. The minimum staff requirements are one food service manager plus five full-time cooks and one part-time cook plus one full-time and one part-time food service helper. The Caterer should indicate the number of staff required and include a two week work schedule showing how the designated number of staff can cover key positions. Inmates will be treated the same as any other apprentice or trainee. They will put in an eight hour day of work and instruction. You must bear in mind that the trainees are not to be left unsupervised. There must be adequate staff supervision of inmates.

49. Schedule "E" of the invitation to tender contains excerpts from the MCS Food Services Manual of "Policies of Food Services in the Ministry of Correctional Services" to which any subcontractor must adhere. It provides, *inter alia*:

1. Each institution must follow the Ministry menu. Only the Superintendent can authorize changes. There are many reasons for this:
 - (i) Each inmate and student should receive a diet that meets "Canadian Dietary Standards", and includes at least the minimum requirement of all essential nutrients required for good health;
 - (ii) The menu is a form of ration scale. Nothing is to be purchased that does not appear on the menu, except for a special occasion approved in writing by the Superintendent;
 - (iii) Inmates complain if inmates in one institution get some item that they do not get in their institution. Each inmate should receive fair and equal treatment.
2. Each inmate should get equal servings of each item on the menu, and should be encouraged to eat some of each, so that he receives a balanced diet. It is most important to encourage inmates to become accustomed to a normal meal pattern, in the hope that they will continue this when they leave. This should be an essential part of any rehabilitation program.
3. Economy must be practised. No food should be wasted. The use of the Ministry's

Standardized Recipes should ensure that the right amount is cooked. If the count varies so that it is difficult to be accurate in the amounts, and food is left over, a use should be devised for it, rather than throw it out.

4. Second servings of meat, milk and dessert are not to be given. If an inmate is engaged in more than moderate activity, second servings of other items can be given, if requested.
5. One hundred per cent (100%) vegetable oil margarine will be served with meals.
6. Coffee will be served only at the breakfast meal. Tea will be served at other times.
7. Canadian food products will be served. Imported food is to be served only when a Canadian equivalent is not available. (This does not apply to Medically ordered Special Diets). The Superintendent may authorize exceptions because of special circumstances.
8. Meals are not to be given to any staff member unless she/he pays for it. The only exception is the presentation of a meal authorization slip signed by the Superintendent or his delegate.
9. No staff member shall request special food to be cooked for him, unless he is on a medically ordered special diet. The request must be approved by the Superintendent.
10. If staff members are eating in the same dining room as the inmates, they must eat the same food as the inmates, and should set a good example for them. If there is a separate dining room and a cash cafeteria for staff, they will be served the "line meal", plus a choice of short order items.
11. Any requests for special food for guests or changes in operation or program should be given to the Superintendent or his delegate, so that she/he can co-ordinate these and evaluate the importance of each and the work-load involved for the food service staff.
12. No staff member should criticize the food in front of inmates. Any legitimate criticism of the food should be given privately to the Food Service Manager or to the Superintendent. The complaints should be in writing and signed.
13. Kitchens and utensils must be kept clean. Good sanitation practices are essential in all food handling operations. The personal cleanliness of everyone working in the kitchen is important. Each person in the kitchen should wear clean white clothes. Hands should be scrubbed with a good disinfectant soap and a nail brush and dried with paper towels (not a communal towel) each time before food is handled.
14. Members of kitchen staff must always have a teaching attitude when working with inmates. The inmates are not in the kitchen just to work, they are there to learn. On-the-job instruction is a most effective method of training in the cooking trade. A good cooking instructor makes a valuable contribution to the rehabilitation of an inmate by teaching him to do a job efficiently.
15. No unauthorized person should enter the kitchen, only those that are there in the line of duty. The kitchen is "out of bounds" to everyone else.
16. Food service staff are responsible for maintaining kitchen security as outlined on page 33.
17. Food service staff are responsible for maintaining a log book as outlined on page 35.

50. The document also prescribes the acceptable "attitudes" which the subcontractors' employees must display towards the inmates, the way in which inmates should or should not be addressed, and page after page of requirements concerning menus, food mix, and portion sizes - all

of which must be strictly adhered to by the subcontractor. We learn, for example, that inmates must receive 3½ ozs. of roast pork (4.8 ozs. raw weight), 6 ozs. of cooked breakfast cereal, 8 ozs. of soup, 1 oz. of tartar sauce, 7 ozs. of spaghetti and meatballs (3 ozs. being meat) etc. Coffee is served at breakfast only - not at lunch or dinner. The food service manager, under the supervision of the local MCS security officer, is responsible for a long list of kitchen security measures - again prescribed in precise detail.

51. Finally, the successful subcontractor is obliged to participate in an inmate training program which is described this way:

INMATE TRAINING PROGRAM - (ON-THE-JOB TRAINING)

The program is to be a realistic work-training experience, equivalent to any apprenticeship training program in the food service industry. We would like to encourage those who have the aptitude and interest to become registered apprentices. For the others, we wish them to have work training experience geared to securing employment.

Each staff member should be assigned up to 5 inmate trainees. He/She then becomes their staff instructor. When the instructor changes shift, his trainees should change shift with him/her.

The instructor should be responsible for his trainees, for their supervision, and for their training and assessment. He should act as a team leader. He will fill in the attached rating sheet on each trainee in his team, at the end of each month. He will fill in the number of hours they spend in each work-training category and will rate their performance in each area (A, B, C, D, or F). He will give an over all rating for the month (at the bottom of the sheet) and add his comments re the attitudes, ability and performance of the trainee. These sheets are important. They may be the only job reference the inmate can present in his search for a job.

The Food Service Manager's Responsibilities in the Program

- (1) Explain the program to the inmates including the system of rating.
- (2) Assign work-training areas to the teams.
- (3) Act as mediator if there are problems between the team leader and his team.
- (4) Review the ratings of the trainees.
- (5) Counsel those trainees who are not fitting into the program so that they are given every chance to adapt, before making the decision to remove them from the program.
- (6) Give the inmates when they leave, copies of their monthly rating sheets (page 38) or a summary of them. You can indicate your Company name on the sheets, if you wish, but no reference to Correctional Services is to appear. The sheets are useful for inmates in obtaining employment or for credit in an apprenticeship training program. The inmate training program is, presumably, a "program designed to assist in the rehabilitation of inmates", established pursuant to section 4(c) of the *Ministry of Correctional Services Act* (see *supra*).

52. The potential subcontractor is advised of the staffing levels required, the *Ministry* classifications, and the *Ministry* salaries and benefits which are associated with those classifications. In other words, the potential subcontractor is told what the MCS pays civil servants for doing the identical jobs. This information can be weighed together with the minimum staff requirements prescribed by MCS when the contractor is framing its bid.

53. The bid itself contemplates estimates of operating costs, made with reference to employee wages, "management" fees, and clothing for the contractor's staff. These must be considered in conjunction with the *Ministry* rules previously mentioned, and the MCS projection that

the contractors' employees will serve approximately 400,000 meals per year. At Elgin-Middlesex, for example, the tender is based on an estimate of an average of 1,100 meals per day, (including staff meals), seven days per week. (Staff is served the same food as the inmates).

54. It will be seen that the contracts here in issue are really "labour only subcontracts" - i.e., what the subcontractor supplies is the services of its employees, whose actual duties are prescribed in minute detail by the Crown, and whose activities on the job are subject to the overriding authority of the superintendent of the correctional institution. It is difficult to see what else the subcontractor really brings to the bargain. Similarly, it is difficult to resist the conclusion that what the Crown obtains from these arrangements is "labour" - possibly (though not necessarily) at cheaper rates than it would be obliged to pay civil servants doing the same jobs, and without the legal obligations, which as their "employer", the Crown would otherwise have to assume. From the employee perspective, they do the same work as civil servants but don't have the same salary, benefits or security; but, by the same token, they might have no work at all if the jobs actually were done by Crown employees. Their employer's business niche lies in providing services that other employers - here the Crown - do not want to provide for themselves or with their own employees.

55. It was said in argument that Parnell brings its "unique expertise in the industry" to the contract, but there is nothing particularly unique or sophisticated about the employee skills here involved. Leaving aside whatever management skills Parnell might dispose on site, it is evident that the employees themselves are not highly trained or skilled individuals whose expertise MCS is able to tap by engaging a specialized subcontractor. It is not, for example, like engaging an electrical subcontractor to repair the wiring or a plumbing subcontractor to fix the pipes. Nor is Parnell like a restaurateur, who combines such elements as bulk buying, the selection of quality ingredients, the creation of innovative menus, marketing, sensitive service, location, the employment of skilled chefs, etc., to develop a successful business. Indeed, the inmate training (apprentice) program suggests that most of the required skills can be acquired in a matter of a few weeks at most. The contractor is, of course, required to provide such training as may be required to its own employees, and to co-ordinate their activities, on site, so that food will be prepared and delivered in a safe and efficient manner. These are management skills which are identifiable, and are related to experience in the food service industry.

56. The inference that the employees, as such, are not particularly significant, is confirmed by some of the experiences of Parnell at the correctional institutions where it has been providing food services. At Metro West, the current manager is a Parnell employee, but he was originally hired by Versa Foods. When Versa Foods lost the contract to Delmar Foods, that manager was taken on by Delmar, then later stayed on with Parnell when it became the successful subcontractor. There were 6 Versa Foods employees when it had the contract in 1988. Some of these stayed on when Delmar got the contract and Delmar completed the employee complement with its own workers. When Parnell became the successful bidder in 1990, Parnell took over all of the employees who had previously been working for Delmar. The Domco/V.S. Services changeover at the Guelph Correctional Centre is recorded in the Board's 1984 successor rights decision.

57. At the Elgin-Middlesex Correctional Centre, the staff has remained more or less constant as the contract has moved from Delmar, to Nutritional, then to Parnell; but the manager has changed each time. Most recently, Parnell brought in its own manager to supervise the operations.

58. Whether the employees at a particular site are unionized or not, Parnell purports to exercise, independently, the prerogatives of an employer. The terms and conditions of employment are set either unilaterally or through the process of collective bargaining. Hiring, firing, pro-

motion, demotion, transfer, lay-off, etc. are all undertaken by Parnell on its own, within the limits or context prescribed by the subcontract with its customer. In these cases, of course, the subcontract is very detailed indeed. At unionized locations employees may have a negotiated right of transfer to other unionized locations where Parnell carries on business.

59. On the other hand, there is no evidence that the Crown has ever exercised, or sought to exercise, any of the authority typically associated with the status of “employer” (hiring, firing, promotion, directing employees in their work, etc.). There is no direct control of this kind. Nor does the Crown pay the employees’ wages (at least directly), or deal with such matters as worker compensation, unemployment insurance, income tax, etc. And, as we have already mentioned, no one argues in these cases that the food service workers nominally employed by the subcontractor are, in law, “employees” of MCS, or that the nature of the relationship between MCS and the subcontractor makes the latter, in law, a “Crown agency”. These cases were all argued before us on the basis that the workers in question were indeed employees of the respondent subcontractors, Parnell or Nutritional. The issues as framed before us were: whether the transaction or relationship between the Crown and Parnell/Nutritional amounted to a Crown transfer; whether the subcontractors and their employees became bound by OPSEU’s collective agreement and bargaining rights; whether OPSEU’s bargaining rights had previously been abandoned at one or other of the correctional institutions; and the effect of the UFCW’s various certification applications. From the workers’ perspective, of course, the issue is which union will be legally entitled to represent them, and whether their wishes will be given any weight in the matter.

* * *

60. Having outlined the facts, we now turn to the legal and policy considerations which affect our decision.

The Functional Approach to Crown Transfers Restated

61. We are called upon in this case to revisit an analysis of the *Crown Transfers Act* which began with *KBM Forestry Consultants Inc.*, [1987] OLRB Rep. March 399, [1987] OLRB Rep. July 1007 and *Charmaine’s Janitorial Services*, [1988] OLRB Rep. Sept. 871, and was confirmed in *Dunning Paving Limited*, [1989] OLRB Rep. July 714, [1989] OLRB Rep. Oct. 1028. In particular, we are asked to take another look at the proposition that the “work” or “functions” that Crown employees perform are “part” of the Crown’s “undertaking”, with the result that if some other employer begins to do those functions, OPSEU’s bargaining rights follow the work. That is the thrust of *KBM*, the interpretation on which OPSEU relies, and, the result which OPSEU urges upon us in the instant case.

62. The *KBM* line of cases hold that OPSEU’s bargaining rights and collective agreement extend to the employees of such employers doing business with the Crown even though no civil servant has been transferred or deprived of trade union representation, and none of the capacity to perform the former “Crown functions” are traceable to the Crown. It does not matter that the transferee may have the organization, means or instruments to perform these tasks, independent of the Crown transaction or anything acquired from the Crown. Likewise, it is unnecessary for the employer to have any previous connection with the Crown, or for its employees to have any connection with OPSEU. It is sufficient if their *functions* are ones which were formerly done by the Crown, and their employer has been engaged by the Crown to do them. The key factor is a continuity of work, or function.

63. For ease of exposition, we will call this approach the “functional analysis”: an undertak-

ing is defined in terms of its functions, a transfer of functions constitutes a successorship, and a successorship binds the transferee and its employees to the union's collective agreement.

64. The result of this analysis appears to be that any work, once done by Crown employees (or in a later development similar to that done by Crown employees) must continue to be done pursuant to the terms of the OPSEU collective agreement with the Crown. When an employer takes on functions that the Crown once did, it also takes on a trade union and a collective agreement. To put the matter another way: whenever employees of a subcontractor do work that is the same or similar to the work that Crown employees have done, they are automatically represented by OPSEU and their terms and conditions of employment are automatically supplanted by those prescribed in the OPSEU agreement with the Crown. In effect, OPSEU maintains an exclusive right to represent workers who do the kind of work civil servants do, even when civil servants are no longer doing it, the workers are not and have never been Crown employees, and the workers may be or wish to be represented by someone else. On this view of the *Crown Transfers Act*, the Crown's "undertaking" is synonymous with the "work" its employees perform.

* * *
* * *

Outline of this Decision

65. It is this approach which the respondents challenge, and which we propose to review in this decision; however, before turning to the *Crown Transfers Act* itself, we think it is useful to sketch in an overview of the concept of successorship as it has developed under the *Labour Relations Act* and related legislation in other jurisdictions.

66. We do so for several reasons.

67. In the first place, the notion of successorship originated under the *Labour Relations Act*, and it is obvious that the provisions of the *Crown Transfers Act* are closely modelled on those which now appear in the *Labour Relations Act*. The statutory language is substantially similar, and superficially at least, the basic thrust of the legislation is the same. The Board's experience under what is now section 64 of the *Labour Relations Act* may illuminate the interpretation of the parallel successor rights provisions in the *Crown Transfers Act*.

68. The effect of the *Crown Transfers Act* is to transplant bargaining rights created under the *Crown Employees Collective Bargaining Act* into the domain governed by the *Labour Relations Act*. Those rights may not fit comfortably in their new setting and, insofar as possible, the Board should interpret the statutory language in a way that will harmonize the two legal regimes. What seems to make sense under the *Labour Relations Act* may help clarify what is intended by the bridging provisions of the *Crown Transfers Act*, and where the Board has a discretion, or a policy choice to make, it should try to avoid a collision between the legal rights embodied in the two statutes.

69. It is also important to appreciate that the "functional approach" which lies at the heart of *KBM* and *Charmaine's* represents a departure from the way in which the law of successorship has developed under both the *Labour Relations Act* and successor rights legislation in other jurisdictions. OPSEU is correct that *KBM* has been followed consistently since 1988, but "the law" itself is relatively new, and *KBM* involves an analysis which is distinct from anything that went before.

70. Whether that departure is justified by the language or context of the *Crown Transfers*

Act will be discussed in some detail below. However, it must be emphasized at the outset, that the *KBM* analysis represents a significant deviation from the way in which other successorship legislation has been interpreted. The *extent* of the deviation can be best understood in light of the substantial body of contrary opinion about what successorship legislation is for, and when it should be applied. The *Crown Transfers Act* is part of the fabric of labour relations law which preceded and followed its passage and, in our opinion, this body of established law is something properly taken into account when one considers where this later piece of remedial legislation “fits” in the legal scheme. If the results are to be different from what obtains elsewhere, there should be good reasons for that different outcome - particularly if the statutory language is similar.

71. Finally, as a specialized tribunal with general responsibility to administer the *Labour Relations Act*, we think it is appropriate to consider the practical labour relations consequences of the competing interpretations urged upon us. In *Hughes Boat Works Inc.*, 79 CLLC ¶14,230, the Divisional Court observed:

It must be a matter of real significance to a tribunal whether a possible interpretation leads to practical or impractical consequences in the field of activity it is called on to supervise. I do not suggest that the consequence should be permitted to confute the clear meaning of a statute. Where, however, one of two possible meanings leads to consequences that a tribunal sees in the light of its experience and expertise as impractical, I see no reason why the tribunal should not reject it. Nor do I think that in the absence of a compelling body of law the court holds a warrant for forcing it upon them.

Where the consequences of the *KBM* approach seem anomalous or inconsistent with other principles reflected in the statute, we think it is useful to point that out.

* * *

72. We will start with an overview of successorship under the *Labour Relations Act* because that is obviously the statute upon which the *Crown Transfers Act* is modelled. As will be seen under the *Labour Relations Act*, the functional view of successorship has been considered and rejected. We will then turn to the federal jurisdiction where during the 1980's there was a brief flirtation with the functional view which, again, was ultimately rejected. The federal experience is instructive because the *Canada Labour Code* is framed like the *Labour Relations Act* but uses the language of “works and undertakings” rather than “business”, and in this respect is like the *Crown Transfers Act*. Similarly, the *Quebec Labour Code* also continues bargaining rights on the transfer of an “undertaking” and for many years the Quebec Labour Court was the leading exponent of the functional view - until the Supreme Court of Canada held that it was wrong in law, and contrary to some of the very collective bargaining values that the statute is designed to promote. Following this review of successorship law as it is understood elsewhere, we will turn to the *KBM* line of cases, and the *Crown Transfers Act* itself.

Bargaining Rights and Successorship under the Labour Relations Act: What bargaining rights are and what they attach to

73. We might begin by noting that a union's bargaining rights are not rooted in, or dependent upon, the very employees who support it at the time of certification. Bargaining rights do not attach to employees, nor do they evaporate with employee turnover. In *Terra Nova Motor Inn Ltd.*, 74 CLLC ¶15,253 Laskin, C.J.C. put it this way:

... At the risk of being unnecessarily obvious, I must point out that the taking of a count of employees in order to satisfy certification requirements of proof that a majority are members of the applicant union does not mean that the certification and the union's status as bargaining agent continue to depend on the very employees remaining in the employer's employ. Fixing the

number of employees as of a particular time to enable a count to be made does not mean that the certificate which a union may obtain on that basis is tied to the identical employees or to that number. The subsequent enlargement or contraction of the work force does not alone affect the validity of the certificate and indeed, once a collective agreement is negotiated the certificate has served its purpose and is, for all practical purposes, spent.

74. A certification order does not grant to a trade union proprietary rights over the work functions performed by employees in a bargaining unit. Bargaining rights do not attach to work, as such, nor give a union any particular rights in respect of such work; moreover, this view is shared by the labour relations boards of British Columbia, Ontario and Canada. As the CLRB noted in *St. John's Shipping Association, et al*, 83 CLLC ¶16,039:

What is it then that the Board certifies when it grants bargaining rights; the work or the employees? It is our respectful opinion that the *Board grants only the right to represent employees*. The very definition of bargaining agent supports that conclusion:

“bargaining agent” means

- (a) a trade union that has been certified by the Board as the bargaining agent for the *employees* in a bargaining unit and the certification of which has not been revoked, or
- (b) any other trade union that has entered into a collective agreement on behalf of the *employees* in a bargaining unit ...

(emphasis added)

Admittedly, the work function of an incumbent in any classification of employee is a consideration of the appropriateness of a bargaining unit and it can be determinative in defining the scope of such a unit, but the certification does not grant an absolute right over those functions. The right to the work, vis-a-vis an employer's right to assign or contract out, etc., can only be won at the bargaining table. Trade union jurisdiction over work is therefore a separate issue from bargaining rights. The latter may be obtained through a certification or voluntary recognition; the former must be asserted.

Those views are supported by at least two other boards:

[Ontario]

While the Board recognizes that bargaining units are often defined in terms of certain job classifications or work categories, these descriptions do not mean that the bargaining agent has an absolute right to the work being performed by the group of employees falling within such job classifications. The reference to work categories in the bargaining unit descriptions, although serving to identify the employees falling within the bargaining unit, does not by itself create an unqualified entitlement to that work.

Canadian Labour Law Reports

(*Toronto Star Newspapers Limited* [1979] 2 Can LRBR 423 (Ont.)) at p. 428.

...

[British Columbia]

The certification does not grant the union the exclusive jurisdiction over the *work* performed by the employees in the unit. The certification only grants the exclusive right to the union to represent the employees. (*Finlay Forest Industries Ltd.*, BCLRB No. L2/81).

[emphasis added]

75. In *Freight Emergency Services Ltd.*, 84 CLLC ¶16,031 the Canada Labour Relations Board elaborated this view in the context of another successor rights application:

To expand on that briefly, the initial granting of bargaining rights whether they be obtained by way of a certification order of the Board or by voluntary recognition gives a trade union the exclusive right to represent the employees in a bargaining unit. Thereafter, any further rights vis-a-vis the work, attach to the business only to the extent provided for in any collective agreement entered into. When the issue is viewed in the context of successor rights, the very wording of the section seems to support the emphasis on the employees and the collective agreement rather than the work:

144. (2) Subject to subsection (3), where an employer sells his business,

(a) a trade union that is the bargaining agent *for the employees* employed in the business *continues to be their* bargaining agent:

• • •

(c) the person to whom the business is sold is bound by *any collective agreement* that is, on the date on which the business is sold, *applicable to the employees* employed in the business:

(emphasis added)

Had there been any intention that bargaining rights created an entitlement to the work, it would have been so easy to construct the [successor rights] section to reflect that; for example, "if the work to which a trade union's bargaining rights attach is transferred from one business to another, etc., etc."

We are therefore unable to make the same fusion of bargaining rights to proprietary rights over work functions that our colleagues do. It naturally follows that we cannot then attach the same permanence to bargaining rights of a trade union that would guarantee their survival no matter whose employees perform the work or how their employer came by the work.

76. To put these comments in perspective, it might be noted again that under the successorship provisions of the *Canada Labour Code*: "business" means any federal work, undertaking or business and any part thereof; and "sell" in relation to a business includes the lease, transfer, and other disposition of the business.

77. It is interesting to note that arbitrators have developed a parallel approach, recognizing that the existence of bargaining rights or a collective agreement does not give employees a proprietary right in their work or ensure a continuation of that work in its current form. In *Canadian Labour Arbitration*, (2d) at p. 215, authors Brown and Beatty observed:

A determination that certain tasks fall within the class of work normally performed by employees within the bargaining unit does not imply that the employees have a proprietary right to that work. To the contrary, in the absence of specific language in the collective agreement providing otherwise, it is now universally accepted that bargaining unit work may be subcontracted to non-employees, provided that the subcontracting is genuine and not done in bad faith. Whatever the view may have been in the earlier awards, it is now settled that to prohibit subcontracting, the agreement must expressly so provide. As one arbitrator has said:

The wide notoriety given to labour's protests against this practice, the almost equally wide notoriety, especially amongst experienced labour and management representatives, of the overwhelming trend of decisions, must mean that there was known to these parties at the time they negotiated the collective agreement the strong probability that an arbitrator would not find any implicit limitation on management's right to contract out. It was one thing to imply such a limitation in the early years of this controversy when one could not speak with any clear certainty about the expectations of

the parties; then, one might impose upon them the objective implications of the language of the agreement. It is quite another thing to attribute intentions and undertakings to them today, when they are aware, as a practical matter, of the need to specifically prohibit contracting out if they are to persuade an arbitrator of their intention to do so.

(See also: *Algoma Steel*, (1968) 19 LAC 236 (Weiler); and *Windsor Public Utilities Commission*, (1974) 7 LAC (2d) 380 Adams.)

78. If employees do not have a proprietary right to the work they are doing from time to time, neither are bargaining rights tied to that precise work (except perhaps in a “craft” bargaining unit). The functions of the employees may change as the business evolves, adding new product lines, new divisions, or entering new markets. Unless the union through a collective agreement has limited the scope of the bargaining unit to particular kinds of work, the typical “all employee” bargaining unit description will continue to cover the employees whatever they happen to be doing, and the union will continue to represent them. There may be questions of classification or payment, but normally there is no erosion of bargaining rights when employees change their work functions. The statute creates an agency relationship in respect of a generic grouping of employees independent of the work they are doing.

What do bargaining rights attach to?

79. The legislation contemplates that collective bargaining will take place within the context of a *specific undertaking* owned by a *particular employer*. The employing entity is an important part of the legal equation. As Beetz J. put it in a case involving the Quebec successor rights legislation:

The second condition for the conclusion of a collective agreement is *that bargaining take place in the context of the specific undertaking of an employer*. Although the Code does not expressly emphasize the specific identity of the undertaking implicated in the negotiation, this requirement is a necessary consequence of the certification procedure and negotiation of the collective agreement. The evidence of this requirement is that the *bargaining units contemplated by the Code are traditionally defined in terms of the specific undertaking in which the unit exists*.

[emphasis added]

(See *Syndicat national des employees de la Commission scolaire regionale de l'outaouais (CSN) v. Union des employes de service local 298 (FTQ)*, *Bibeault et al.* [1988] 2 SCR 1048.) Bargaining rights encompass a *business organization* that is owned by someone; and relate to the employees *in that operation*.

80. The employer is an essential element in this “triad”. If its legal identity changes because of a sale or other disposition of the undertaking, collective bargaining rights would be lost. That is the “mischief” which the successor rights legislation was designed to correct.

The purpose of “successor rights” under the Labour Relations Act

81. In *Metropolitan Parking*, [1979] OLRB Rep. Dec. 1193, the Board described the mischief to which successor rights legislation is directed, and the balancing of interests embodied in its current formulation:

19. In the absence of a successor rights provision any change in the legal entity constituting the employer would destroy subsisting bargaining rights, whether they flow from certification or derive from a collective agreement with the predecessor employer. Incorporation of the business, its transfer to other individuals, or a change in a partnership, would all effect a change in “the employer” even where the plant equipment, products and work force remain substantially

the same. The employees might find themselves working at the same plant, at the same machine, under the same working conditions, with the same supervision, doing exactly the same job as before, but as a result of a transfer (of which they may not even be aware) their collective bargaining rights and their collective agreement would disappear. Section 55 avoids this destruction of bargaining rights and prevents a dislocation of the collective bargaining *status quo* by transforming the institutional rights of the union and the individual rights of the employees, (both of which are grounded upon the statute) into a form of “vested interest” which becomes rooted in the business entity, and like a charge on property, “runs with the business.” In *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733 the Board described the effect of section 55 as follows:

“Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.”

20. The concept of successorship is an attempt to balance the interests and expectations of parties in the industrial community and preserve both collective bargaining stability and industrial peace. The employer retains his freedom to dispose of all or part of his business; but it is recognized that one cannot realistically expect that the interest of employees will be at the forefront of his negotiations. On the other hand, his employees may have recently struggled to become organized or to achieve a collective agreement. They expect that their statutory right to bargain collectively and their negotiated conditions of employment will have some permanence. Their expectations would be frustrated if a transfer of the business terminated both. Of course, the transfer of the business is not the only occurrence which could frustrate employee expectations. A re-organization of the production process, the introduction of “job destroying” technological change or a geographic move beyond the scope of the collective agreement will also materially change the industrial relations *status quo*. A business transfer, however, involves a new employer and raises legal problems of an entirely different order which cannot easily be accommodated in a bilateral bargaining process. It is to these problems that section 55 is addressed.

(See also *Moore Groceteria Ltd.*, [1980] OLRB Rep. Apr. 486, *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887, and generally G.W. Adams *Canadian Labour Law* at pages 398 ff.)

82. This description of “the problem” echoes that of the Ontario Legislature’s Select Committee on Labour Relations (1957-1958), as well as the Report of the Royal Commission on Labour Management Relations in the Construction Industry (1962). Both bodies concluded that a change in ownership of a business should not disturb bargaining rights, *provided the business organization or undertaking was continued, unchanged*. The Select Committee recommended:

It is the recommendation of the Committee that where-

1. A Trade Union has been certified as the bargaining unit [sic] for the employees of an employer, or
2. Where an employer has entered into a collective agreement with a union, and where in either instance the facts establish that the plant, property, equipment, products and working force remain virtually unchanged as a result of the sale or other transfer-in-law of the business of the employer, and no essential attribute of the employment relationship has been changed as a result of the sale or other transfer-in-law, the certification and consequent obligation should continue or the collective agreement should continue to be binding, as the case may be, notwithstanding the change in legal ownership of the business enterprise.

83. The focus is on a continuation of the *undertaking* - not merely “work” or “functions”.

84. These recommendations were not introduced into law until 1963 - and then only partially. For the first few years, the successor rights legislation preserved only bargaining rights, not

the negotiated collective agreement. It was not until 1970 that the statute provided for a flow-through of the collective agreement. Nevertheless, in considering the ambit of successor rights legislation, we think it is useful to recall its origins, and the “mischief” the Legislature appears to have had in mind.

What a “business” is under the Labour Relations Act

85. The Successor Rights provisions contemplate the maintenance of the “triad” to which we have already referred: employer - trade union - undertaking; and address the situation where the identity of the employer changes but the undertaking continues. Under the current scheme, where all or part of the business is transferred to another employer, bargaining rights are preserved and the new employer stands in the shoes of the predecessor. However, the legislation leaves it to the Board to determine what a business is, and whether it is “the business” which has been sold, and continued, in the hands of a new owner. In *Metropolitan Parking*, the Board explored this problem in a long passage to which we might usefully refer:

29. A more difficult question is whether it is the predecessor's “business” which has been transferred and continued by the successor or, alternatively, there has merely been a transfer of assets or other incidental elements of the business. Unlike *The Successor Rights (Crown Transfer) Act*, *The Labour Relations Act* does not contain a statutory definition of “business”, and it is the Board, therefore, which must develop an appropriate meaning. In *Raymond Cote*, [1968] OLRB Rep. Mar. 1211 the Board commented:

“The meaning to be attached to the word ‘business’ depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is ‘the totality of the undertaking.’ The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with the management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business.”

While one usually thinks of a business as a profit-making economic activity, the term “business” in *The Labour Relations Act* cannot be so restricted. The Act also applies to municipalities, public libraries, school boards, hospitals and other non-profit service undertakings which have employees and engage in collective bargaining. The economic activities of these entities are of an entirely different character from those of commercial enterprises, yet the definition of “business” must be broad enough to include them. Even a wholly commercial enterprise will consist of many elements, some of which will be integral, and others merely incidental, to the total undertaking. And, in the case of undertakings in the service sector, “know how”, managerial systems and other intangibles are likely to be more important factors in the overall organization than particular physical plant and equipment.

30. A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a “going concern”, something which is “carried on.” A business is an organization about which one has a sense of life, movement and vigor. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a “business” from an idle collection of assets. This notion is implicit in the remarks of Widjery, J., in *Kenmir v. Frizzell et al*, [1968] 1 All E.R. 414 - a case arising out of legislation similar to section 55. At page 418 the learned judge commented:

“In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. *In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the*

activities of which he would carry on without interruption. Many factors may be relevant to this decision through few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not choose to avail himself to all the rights which he acquires thereunder. Similarly, an express assignment of goodwill is strong evidence of a transfer of the business, but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete. The absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before."

[Emphasis added]

Widjery, J. took the same approach as that adopted by this Board, concentrating on substance rather than form, and stressing the importance of considering the transaction in its totality. The vital consideration for both Widjery, J. and the Board is whether the transferee has acquired from the transferor a functional economic vehicle.

31. In determining whether a "business" has been transferred, the Board has frequently found it useful to consider whether the various elements of the predecessor's business can be traced into the hands of the alleged successor; that is, whether there has been an apparent continuation of the business - albeit with a change in the nominal owner. The Board in *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed) commented:

"In each case the decisive question is whether or not there is a continuation of the business ... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was [sic] before, i.e. whether there has been a continuation of the business."

The issue before the Board remains whether there has been a "transfer of a business"; but it is much easier to make that finding, and to conclude that the collective bargaining relationship should be continued, if there is substantial continuity of all the other elements of the predecessor's business. If the elements formerly used by "A" to carry on business are not in the hands of "B", and used for the same business purposes, it is difficult to resist the conclusion that there has been some form of transfer from "A" to "B" - albeit complex and indirect, and perhaps even by operation of the law.

32. Of particular significance for a labour relations statute is the continuity of the work performed before and after the transfer, since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section 55 is to preserve both the bargaining relationship and the collective agreement. If the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of section 55. This approach has not only been taken by the Board in a number of cases (see, for example, *Culverhouse*, *supra*, and *Dennis Moran* [1977] OLRB Rep. Apr. 277) but also appears to have been adopted by the Brit-

ish Columbia Supreme Court in *R. v. B.C. Labour Relations Board ex parte Lodum Holdings Ltd.*, (1969), 3 D.L.R. (3d) 41. In that case, the Court was considering an application for *certiorari* in respect of a decision involving what was then the successor rights section of the *British Columbia Labour Relations Act* (it has since been amended.) At page 52 Dryer, J. characterized the question before the Board as follows:

“One must keep in mind that the problem before the Labour Relations Board was one of labour relations and consequently, though as pointed out above the whole law must be considered, the weight to be assigned various factors and the inferences to be drawn from certain evidentiary facts are not necessarily the same as would be the case if the problem were one of, say, taxation or control of assets. *The importance of the ‘business’ in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors such as whether the jobs are being performed at the same or substantially the same times and places, in respect of the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer.*” [Emphasis added]

Unless there is a continuation of the work and jobs, it would make little sense to preserve the collective agreement. Accordingly, the continuity of the work done is an important indicium of a transfer of a business.

34. This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a “business”, or “a part of a business” and the transfer of “incidental” assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided. Thus, an apparent continuity of the business may not be significant if the alleged successor has already been engaged in a similar business, or has set up a “new” business which resembles the “old” one in many respects. In *Ralph Ford Electrical*, [1974] OLRB Rep. June 388, for example, several key employees of the alleged predecessor became dissatisfied and struck out on their own in competition with their former employer. In that case the Board found that there was not a transfer of a business, but rather the creation of a new “parallel” business which only incidentally made use of some of the tangible elements of the predecessor’s business organization. Similarly, in *Sunnybrook Food Mkt.*, [1974] OLRB Rep. Jan. 47 the continuation of a grocery business on the same premises, and with some of the same fixtures, was not enough to support a successorship finding. The Board was not satisfied that there had been a transfer and continuation of the predecessor’s business (i.e., the business that he *owns and operates*) but simply the continuation of a like business. It is recognizable that so long as there is a market for a product, some entrepreneur is likely to appear who will produce for that market and, in so doing, he may share many of the characteristics of his alleged predecessor.

86. The Board’s conception of the “business” under the *Labour Relations Act* is an operational or instrumental one. The business is not its legal envelope, nor the employees, nor some incidental or unrelated grouping of assets nor the body of work in which employees may be engaged from time to time. It is a delivery system, an economic vehicle, an organizational means of getting something done. It is to this vehicle that bargaining rights attach and in which they continue if the undertaking or a coherent part of it is transferred to a new owner.

87. For ease of reference, we will call this the “*instrumental view*” of the undertaking and successorship. It is the one which has been accepted in virtually every successor rights statute in every other jurisdiction - until this Board’s recent decisions in the *KBM* line of cases.

What is meant by a “part” of a “business” under the Labour Relations Act

88. It can sometimes be difficult to determine whether a sufficient “part” of the business

has been transferred to warrant a continuation of bargaining rights. This, too, was considered in *Metropolitan Parking*:

33. There need not be a transfer of the entire business before section 55 comes into play. The successor rights provisions may also be triggered by the transfer of "part of a business." [See section 55(1).] This language suggests that bargaining rights continue when something considerably less than "the totality of the undertaking" has been transferred. Presumably the Legislature envisaged the preservation of bargaining rights where there is a severance and transfer of a discrete, cohesive portion of the economic organization or activities which comprise the totality of "the business". The Board has found a transfer of "part of a business", where one of a chain of retail stores has been sold to a competitor (*Supercity Discount Foods*, [1979] OLRB Rep. Apr. 119; *Loblaws Groceries Ltd.*, [1973] OLRB Rep. Jan. 73); where there is a transfer of the right and means to produce one of the products formerly produced by the predecessor's business; *Canac Shock Absorbers*, [1973] OLRB Rep. Oct. 508); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Co. Ltd.*, [1970] OLRB Rep. Jan. 1244), and where there was a transfer of the oil burner installation and service branch of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Ltd.*, [1971] OLRB Rep. May 515.) In each of these cases the Board found that the predecessor had transferred a coherent and severable part of its economic organization - managerial or employee skills, plant, equipment, "know how" and goodwill - thereby allowing the successor to serve the market formerly served by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. It was otherwise in *Woodway Structural Components*, [1971] OLRB Rep. Nov. 732, *Canada Cement LaFarge Ltd.* [1975] OLRB Rep. Dec. 905, and *Dufferin Steel*, [1976] OLRB Rep. Mar. 81. In these cases there was a significant change in the character of the work, product or market so that the Board concluded that what had been transferred was not the predecessor's business. The successor had merely incorporated incidental elements of that business into his own economic organization - even though each of the elements acquired could previously be found in the predecessor's business organization and, in that sense, were "part" of the predecessor's business. What was transferred lacked that dynamic quality which distinguishes an idle collection of surplus assets from an active, severable and coherent part of a going concern.

In *Vaunclair Meats Limited*, [1981] OLRB Rep. May 581, the Board put it this way:

28. In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization managerial or employee skills, plant, equipment, "knowhow" or goodwill, - thereby allowing the successor to perform a definable part of the economic functions formerly performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage. In all of the cases, there was a transfer of a distinct part of the predecessor's configuration of assets, and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of at least a part of the employee complement; and but for section 55, the established bargaining and collective agreement rights would have been lost. This was the very mischief to which section 55 is directed, and the Board was satisfied on the evidence in each case that it should be applied.

What a "business" is, depends upon the economic context

89. The determination of what constitutes "a business" or "part of a business" is complicated by the fact that the critical characteristics of a business undertaking, depend upon the economic context; for although the statute uses the word "business", that term is intended to apply to the whole range of public and private sector undertakings covered by the *Labour Relations Act*. In the *Tatham Co. Ltd.*, [1980] OLRB Rep. March 366, the Board observed:

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a "sale of business" finding in one sector of the economy may be insufficient in another. In some industries, a particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, "know-how", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

Under the Labour Relations Act a business is not the same as the employees or their work

90. Regardless of the difficulty in defining what a "business" is in particular cases, the Board has consistently held that it is *not* synonymous with the employees or their work, nor does a successorship arise merely because employees formerly represented by a trade union end up working for someone else, or the work which unionized employees once did ends up being done by someone else. Under the *Labour Relations Act*, a transfer of work does not, by itself, result in a transfer of bargaining rights even when the work transfer is effected by means of a subcontract so that the work in question is identical. In *Metropolitan Parking* the Board held:

36. *Despite the labour relations focus of the statute "the business" is not synonymous with its employees or their work.* In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employees may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going concern; but these cases are rare. For the most part, the continued employment of the predecessor's employees is only one factor to be considered. The reason for this is succinctly stated by the Canada Labour Relations Board in *N.A.B.E.T. v. Radio CJYC Ltd. et al.*, (1978) 1 Can. LRBR 565:

"The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining agent for a unit of employees of an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. *Bargaining rights do not attach to certain specific employees as individuals.* Therefore, in defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons formerly in the employ of A are now in the employ of B. Furthermore, to focus on that question would invite employers to avoid the successorship provisions by refusing to maintain continuity of the individuals employed. A key to the protecting of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it ...

But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand. [Emphasis added]

A continuity of the work and/or the employees is significant, but it is not always sufficient, to sustain a finding of successorship. This Board adopted a similar view in *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 - a case which, like the present one, involved the consequences of a loss of a contract:

“There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. *It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself.* While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.”

The focus of section 55 is the business entity - the employer's total economic organization - not simply the work which the employees perform.

37. The present case involves a form of subcontracting, and subcontracting arrangements always involve the transfer of work. Work or services performed by A's employees within A's own organization are “contracted out” to B, and B uses his own managerial skills, plant, equipment and “know how” to supply to A, for a price, the product, services, facilities or components formerly produced by A's employees. A, therefore, is contracting for the use of B's economic organization in lieu of his own. A is generating a particular demand, or market, for B's product, and it is implicit in the arrangement that, thereafter, the two businesses will remain in a kind symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part, of a business. If it is clear on the evidence, however, that B is unable to fulfil A's requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transaction no longer looks like a simple contracting out of work. A may not be making use of B's economic organization, rather A may be transferring part of his economic organization to B (and recall that section 55 is triggered by the transfer of “part of a business”) or merely permitting B to make use of his (A's) organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors unequivocally demonstrates or foreclose the application of section 55 (or section 1(4)). If, however, “but for” the transfer of such assets, licences, know how or property interests from A, B would be unable to fulfil the contract, then it is easier to infer a transfer of part of A's business - albeit a part which A no longer wishes to operate itself.

38. Similar considerations apply where A, for his own business reasons, chooses to change subcontractors and purchase his requirements elsewhere. Here also there would be a continuation of the work performed, and the new subcontractor may find itself in the same position of economic interdependence *vis-a-vis* A as a previous subcontractor. Again, these factors do not, in themselves, determine the applicability of section 55. Essentially the matter remains one of characterization. Is the transfer, if any, from the predecessor merely incidental, or is it integral, to the successor's ability to produce the goods or supply the services formerly produced by the predecessor? Has the successor acquired all, or a coherent and severable part, of the predecessor's economic organization? And to repeat the words of Widjery, J. in *Kenmir*, *supra* has the transaction put the successor in possession of a going concern, the activities of which he could then carry on without interruption? A transfer of work, by itself, is simply not enough to ground a section 55 finding.

91. For a transaction to be considered a “sale of a business” there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a “going concern”. A business is

not synonymous with its customers or the work it performs or its employees. Rather, it is an economic organization which is used to attract customers or perform the work.

92. The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed. It could quite easily have legislated the "functional" approach to successorship. But it did not do so. Bargaining rights are continued only when the employer transfers its *business*.

* * *

Federal Jurisdiction: Triumph of the instrumental approach to successor rights under the Canada Labour Code

93. The competing viewpoints which were settled in Ontario in cases such as *Metropolitan Parking*, *supra*, and *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293, were debated on the federal scene in a series of contradictory decisions in the early 1980's. The Canada Labour Relations Board sought to resolve these contradictions by an unusual plenary "Full-Board Decision", but not too long afterwards, one informed commentator observed:

"In mid-1982 the Board acknowledged the differences emerging in decisions being issued by different quorums in French and English following the diverging leads of Quebec and other provinces. The issue was referred to the Board in plenary session and in a 1983 unanimous decision, the Board, in its words, adopted an "inductive" rather than "Cartesian" approach in defining business. While it appears the Board is rejecting the Quebec approach [i.e. the "functional" view] in favour of the legal nexus attitude elsewhere, the language of the decision allows considerable latitude for individual quorums. Only with the experience of several more decisions may more firm conclusions be drawn."

Those decisions were not long in coming and in *Freightway Emergency Services Ltd.*, (1984) CLLC ¶16,031, a quorum of the Canada Board commented:

"The observations of past Vice-Chairman Dorsey proved correct; shortly after *Terminus Maritime Inc.*, *supra*, two decisions came down that clearly indicated that some members were still intent on going off on a frolic of their own."

94. These decisions reflected two very different views about the "mischief" and therefore the reach of successor rights legislation: the "functional" view of the Quebec Labour Court rooting bargaining rights in work, so that they follow the work, whether or not employees, assets etc. had been transferred; and the "instrumental" view adopted in cases like *Metropolitan Parking*, which held that successorship required a transfer and continuity of "the undertaking" - the productive vehicle - rather than merely the work.

95. Each of these is a legitimate analytical framework, but they have quite different collective bargaining results, and strike a different balance among the competing policies found in the statute. The Quebec view provides superior protection for the institutional rights of an incumbent union. But it creates an inevitable collision with the values of free collective bargaining and freedom of association when those rights are extended to employers and employees who are total strangers to the undertaking in which the collective agreement was negotiated.

96. These conflicting viewpoints were eventually settled (not reconciled) by the Canada Labour Relations Board in *Freight Emergency Ltd.*, *supra*, and *Cafas Inc.*, (1984) CLLC ¶16,034. Both of these cases involved subcontracting arrangements (which, by definition, involve a "transfer" of "work" or "functions") and both adopted the instrumental approach set out by the Ontario

Board in *Metropolitan Parking*, *supra*. After a thorough analysis of the case law in Ontario and Quebec, the panel in *Freight Emergency Services* described the debate within its own tribunal:

The debate in Quebec over the need for a legal relationship between an employer and its successor which was referred to by the panel in *Music Mann Leasing Ltd.*, *supra*, had already spilled over into the federal jurisdiction. Decisions started appearing that took the [Canada] Board off in new directions from its previously published position. Views began to be expressed that bargaining rights flowing from a certification order of the Board attach only to the work function. It was said that the identity of an employer and the employees are irrelevant except at the initial certification or subsequent revocation proceedings when employees' wishes have to be determined. The certification order bestows a propriety right over the work function and that right survives no matter whose employees perform the work or how their employer comes by the business. (see *Newfoundland Steamships Ltd.* (1981), 45 di 156; and [1983] 2 Can LRBR (N.S.) 40; *Quebec Sol Services Limited* (1981) 45 di 233; and [1982] 2 Can LRBR 369; and *J.T. Aviation Services Ltd.* (1982), unreported Board decision no. 390).

Sale of business and successor rights declarations were made in situations where contracts had been obtained by way of public tender. Successful bidders for contracts found themselves inheriting union bargaining rights that had been attached to the work function carried on by predecessor employers that had lost the contract. The Board's policy requiring a nexus between the predecessor and the successor had been discarded.

* * *

When section 144 was enacted in 1973, it was our understanding that the goal of the legislators was to protect established bargaining rights and benefits accrued through collective bargaining where new employers assume control of enterprises wherein the employees have already exercised their rights under the Code. In our minds, successor rights were never intended to apply to genuine circumstances of subcontracting, a loss of business to a competitor or where there is a corporate dissolution. It was certainly never anticipated that section 144 would be a vehicle to extend bargaining rights to or impose collective agreements on non-unionized employees or their employers.

* * *

...To pursue the work as the predominant guideline could result in more violence to the basic principles of free collective bargaining and the freedom of association upon which the Code is founded, than section 144 was originally designed to counteract. The results could be that collective agreements are imposed upon employers and employees without them having had an opportunity to negotiate the contents and, bargaining agents could be thrust upon employees without them having had a chance to exercise their freedom of choice.

To obtain the true purpose of the section and to avoid infringing upon other major policy considerations in the Code, it is necessary to consider much more than where the work goes. We repeat and subscribe to what was emphasized earlier in this decision:

*But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand. (Radio CJYQ Limited, *supra*, at pages 587-8 and 574).*

(emphasis added)

97. In *Cafas* the Canada Labour Relations Board endorsed the decision in *Freight Emergency Services* observing that its:

"interpretation is the cornerstone of a rational interpretation of section 144; an interpretation

that recognizes the original intent of the section as opposed to the divergent interpretations of intent that have resulted since its promulgation”.

The Quebec cases were reviewed and rejected. The *Metropolitan Parking* approach was adopted. A purported transfer of work by means of a subcontract, did not, in itself, trigger a successorship.

Quebec: Supreme Court reversal of the functional approach to successorship

98. Interestingly, while this debate within the CLRB was ongoing, a case (*Bibeault*) was wending its way to the Supreme Court of Canada that called into question the legal analysis upon which the Quebec approach was based. The successorship legislation in Quebec was not much different from that in other jurisdictions, but by adopting the functional view that bargaining rights follow “work”, the Quebec Labour Court had given that legislation a reach beyond that of similar statutes in common-law provinces. As the CLRB had predicted, subcontractors were inevitably bound by the collective agreements of the prime contracting party or a former subcontractor even though the subcontractor might have acquired nothing more than an opportunity to perform work, once done by somebody else. The problems were multiplied when one or more bidders were already unionized, or the work was parcelled out in shifting sequences to different subcontractors.

99. It was this recipe for commercial confusion and inter-union rivalry, which prompted one cleaning subcontractor to challenge the functional view in the Supreme Court of Canada. And, it is interesting to note that it was a cleaning contractor who obtained the work through a bidding process conducted by a public authority - that is, a fact situation parallel to that in *Charmaine's* (see *infra*).

100. Sections 45 and 46 of the Quebec Labour Code read as follows:

Certification not invalidated by sale of undertaking

Sec. 45. The alienation or operation by another in whole or in part of an undertaking otherwise than by judicial sale shall not invalidate any certification granted under this code, any collective agreement or any proceeding for the securing of certification or for the making or carrying out of a collective agreement.

New employer bound

The new employer, notwithstanding the division, amalgamation nor changed legal structure of the undertaking, shall be bound by the certification or collective agreement as if he were named therein and shall become *ipso facto* a party to any proceeding relating thereto, in the place and stead of the former employer.

Recording transfer of rights

Sec. 46. It shall be the duty of the labour commissioner, upon the motion of an interested party, to rule on any matter relating to the application of section 45.

[Applicability of section]

For such purpose, the labour commissioner may determine the applicability of that section and issue any order deemed necessary to effect the transfer of rights or obligations contemplated therein. He may also settle any difficulty arising out of the application of that section.

101. The Quebec legislation is quite similar to that found in other jurisdictions.

102. The facts in *Bibeault* were uncontroversial, and were, in fact, quite typical of many subcontracting situations.

103. In *Bibeault*, a cleaning contractor obtained work through a bidding process conducted by a public authority and a labour commissioner held that there was a transfer of collective bargaining obligations from the former subcontractor because the employees continued to do the same work - even though the new subcontractor had its own tools, equipment, employees, etc., and had “received” nothing more than the “right” to do that work. This finding by the labour commissioner was consistent with a significant body of the Quebec jurisprudence and found favour with a number of judges of the Quebec Labour Court, following its own earlier decision in *Jack Schwartz Service Station v. Teamsters Local Union 900*, [1975] TT 125. There, the Labour Court had held that if the functions performed by an undertaking were taken on by someone else, bargaining rights followed function, and the union’s agreement bound the new party and its employees.

104. The Supreme Court of Canada rejected this “functional” approach. The Court held that it was wrong in law, and constituted an improper interpretation of the successor rights provisions in the Quebec Labour Code.

105. The Court accepted that: “The object of section 45 is unquestionably to protect the benefits resulting from certification and the collective agreement”; however, the Court rejected the notion that bargaining rights attach to the employees’ “work” as opposed to the *undertaking* in its totality. In so doing, the Court adopted the instrumental approach which was now the settled law of successorship outside Quebec. The Court commented:

Each undertaking consists of a series of different components which together constitute an operational entity. It goes without saying that one of these components is the work done in the undertaking; but the specific identity of the undertaking is also determined by its particular physical, intellectual, human, technical and legal components.

* * *

It is also clear that when an undertaking is alienated or operated by another in whole or in part, the essential components of this three-part framework must continue to exist if the certification or collective agreement are to remain relevant. The collective agreement itself provides an example. If the circumstances of the alienation or operation by another of the undertaking are such that this three-part framework disappears, the collective agreement cannot apply. The conditions in which the agreement was intended to operate will no longer exist.

The Code thus anticipates the effect of the arrival of a new employer due to the alienation or operation by another of the undertaking and the effect of certain changes in the legal structure of the undertaking on relations between the employer and employees as a whole; but the Code in no way dispenses with the requirement that there be an employer who controls the undertaking. *Further, the requirement of a specific undertaking, at least in operational terms, also remains necessary for implementation of s.45. In the absence of a specific expression of legislative intent, the provisions of s.45 cannot be interpreted to operate in a manner contrary to the basic framework created by the Code of a single employer, a specific undertaking and an association of the employer’s employees.*

Any interpretation of s.45 must be consistent with the three-part context which I have described above. By rejecting the need for a legal relation between successive employers and adopting a “functional” definition of the undertaking, the labour commissioner gives s.45 an interpretation that does not recognize the existence of the three-part context in which collective bargaining must necessarily take place.

[emphasis added]

106. The Supreme Court held that the Quebec adjudicators gave an unnecessarily broad interpretation of the “mischief” to which the successor rights legislation was directed, and this had

prompted a misconstruction of their statutory provisions. In attempting to protect union interests, they had gone beyond what the statute provided:

With respect, I believe that because of their desire to protect the certification and collective agreement despite all the vicissitudes of the undertaking, the labour commissioner and the majority of the Labour Court have taken a position inconsistent with the purpose of the *Labour Code*: to promote collective bargaining as a better means of guaranteeing industrial peace and of establishing equitable relations between employer and employees.

107. It is instructive that in this passage the Court accepts that “the work” may in some semantic sense be considered a “component” of the undertaking, but the Court nevertheless finds that it is not a “part of the undertaking” within the meaning of section 45, because the legislature did not intend bargaining rights to attach to a “component” of this kind. As the Ontario Board had noted in *Metropolitan Parking*, not everything that could be considered a “part” of an undertaking was the kind of “part” to which bargaining rights would attach. The term had a labour relations meaning which could be gleaned from industrial relations considerations and the mischief the statute was designed to correct.

108. The Court then went on to consider and reject what it labelled the “functional” definition of the word “undertaking” upon which the Quebec analysis was based, and which found a successorship when one employer took on the functions of another:

2. The Definition of the Undertaking

In the context of s. 45, the undertaking becomes the most important component of the three-part framework postulated by the legislator: *continuity of the undertaking is the essential condition for s. 45 to apply*. The interpretation of s. 45 must therefore be approached through the definition of an “undertaking”.

In his majority judgment Chief Judge Geoffroy gave the undertaking a definition which is limited to the duties performed by the employees as described in the certificate of certification. Continuity of the undertaking, an essential condition for s. 45 to apply, is determined by reference to the similarity of the duties performed by workers for their new employer (at pp. 123-24):

[TRANSLATION] The undertaking must be defined, since the legislator has not done so. The decisions of the Court, since the judgment of the late Associate Chief Judge Donat Quimper, have regarded it for the purposes of the Code in light of the collective agreement:

The undertaking ... is the group of operations performed in an establishment in order to fulfil its purpose, the word “operation” being used in the broad sense of tasks, functions, occupations and activities.

This definition will be found, without substantial difference, in other jurisdictions. They all have in common that they regard an undertaking from the standpoint of the labour which performs the various functions necessary to carry out its purposes. This is the undertaking which is covered by a certification, it is for this undertaking that a collective agreement is concluded, becoming the law that governs it. It is with this undertaking that the certification and the agreement are associated.

This definition of the undertaking is the same as that given by Chief Judge Geoffroy in 1975 in *Jack Schwartz Service Station v. Teamsters Local Union 900*, *supra*, at p. 128:

[TRANSLATION] ... finding the same undertaking under new management means finding the same jobs, tasks, activities and so on. These components are the basis and the object of the certification and the collective agreement.

This definition, and I say so with respect, is incorrect: the generality of its terms does not allow for

identification of a specific undertaking and so leads to the transfer of rights and obligations in situations where there is no continuity. In addition, the "functional" definition gives a description of the undertaking which cannot be reconciled with the legal operations mentioned in s. 45.

It is of the very essence of an undertaking that, for the purposes of s. 45, it may be subject to alienation, operation by another, amalgamation, division or a change in legal structure. Defining the undertaking without considering the legal operations to which it may be subject results in an interpretation of s. 45 that cannot be justified by its wording.

The abstract definition of the undertaking suggested by Chief Judge Geoffroy does not take the whole of s. 45 in account. By describing the undertaking solely in terms of the functions or positions of the employees, the Chief Judge removes the undertaking from the various legal acts which are essential to the application of s. 45.

The use of the word "alienation" in s. 45 is inconsistent with the definition of an undertaking adopted by the Chief Judge. When he parts with his undertaking by sale, gift or other means, an employer is not alienating a group of functions but rather immovable property, equipment, work contracts, inventory, goodwill and so on, as the case may be. The legislator is explicit: s. 45 concerns the alienation of an "undertaking", not the alienation of "functions".

[emphasis added]

The Supreme Court concluded:

It is thus incorrect to treat the undertaking and the positions or functions listed in the certificate of certification as equivalent. The undertaking is not created by the certification: it predates it. Section 45 recognizes this simple fact in as much as it applies from the moment proceedings to obtain a certification are initiated. When a certification exists, it plays an important role: the certification lists the functions and duties carried out by the employees and permits a determination as to whether these functions and duties continue to exist within the new employer's operations.

*Instead of being reduced to a list of duties or functions, the undertaking covers all the means available to an employer to attain his objective. I adopt the definition of an undertaking proposed by Judge Lesage in a subsequent case, *Mode Amazone v. Comité conjoint de Montréal de l'Union internationale des ouvriers de vêtement pour dames*, [1983] T.T. 227, at p. 231:*

[TRANSLATION] The undertaking consists in an organization of resources that together suffice for the pursuit, in whole or in part, of specific activities. These resources may, according to the circumstances, be limited to legal, technical, physical, or abstract elements. Most often, particularly where there is no operation of the undertaking by a subcontractor, the undertaking may be said to be constituted when, because a sufficient number of those components that permit the specific activities to be conducted or carried out are present, one can conclude that the very foundations of the undertaking exist; in other words, when the undertaking may be described as a going concern. In *Barnes Security*, Judge Rene Beaudry, as he then was, expressed exactly the same idea when he stated that the undertaking consists of "everything used to implement the employer's ideas".

...each case is unique in terms of adding a number of components to determine the foundations of the undertaking, in whole or in part. It is not always necessary for the movable and immovable property to be transferred, for specialized technical resources to be transferred, for inventory and know-how to be included in the transaction. There must however be adequate resources, directed towards a certain activity by the first employer, which are used by the second in an identifiable way for the same purposes in terms of the work required from employees, even if the commercial or industrial objective is different.

Precisely because of the need to identify in the second employer's operations the same use of operating resources transferred by the first employer (otherwise there would simply have been a transfer of physical assets which can be used for any pur-

pose), it was found to be desirable to simplify matters and to say that, once the same activities were carried on by a second employer, it followed that the latter must have acquired sufficient operating recourses from the first to ensure continuity of the undertaking. Some have gone even further and, seeking simply guidelines and accessible formulas, have purported to see passages in certain judgements as affirming a so-called occupational theory of the undertaking. This is an indirect way of getting around the problem of the legal relation, by reducing or indeed eliminating the practical necessity for a legal relation in the continuity of the undertaking.

[emphasis added]

109. It will be seen that the Court's view in *Bibeault* is the same as that adopted by the Ontario Board in *Metropolitan Parking*, and the Canada Labour Relations Board in *Cafas* and *Freightways Emergency Services*. The term "undertaking" in a successor rights context means the mechanism by which work is done or functions are performed - not the work or functions themselves. A similarity or continuity of work functions is not sufficient to establish a "transfer of part of an undertaking", although if the undertaking has in fact been transferred there will normally be a continuity of functions. Beetz J. wrote:

I repeat that similarity of functions is necessary to determine whether the essential elements of the undertaking continue to exist, but it is a mistake to make this the absolute criterion for applying s. 45. In general this criterion does not allow a distinction to be made between two rival undertakings. *Similarity of functions as such could only indicate continuity in an undertaking to the extent that the undertaking in question has no other special characteristic.*

Instead of an unwarranted focus on a single factor, the test of continuity in an undertaking requires identification of the essential elements of the undertaking, which must be found to exist to a sufficient degree in the new employer's operations. Each component must be weighed according to its respective importance. If the clientele of a certain undertaking is by nature fluid, the fact that the new purchaser has kept none of his predecessor's customers will not be significant. On the other hand, an undertaking whose primary characteristic is exclusive equipment will be transferred to a new employer only in so far as the latter has acquired *inter alia* the equipment in question.

...

I think it is opportune to summarize here the essential points of the interpretation of s. 45, as developed above.

The undertaking at issue in s. 45 [TRANSLATION] "consists of a self-sustaining organization of recourses through which specific activities can be wholly or partly carried on" (*Mode Amazone, supra*, at p.231). The nature of collective bargaining requires that this undertaking be that of an employer. The employer is the one designated in the certification, the collective agreement, or by any proceeding "for the securing of certification or for the making or carrying out of a collective agreement" (s. 45). Alienation or operation by another of this undertaking establishes, by means of a voluntary transfer of a right, a legal relation between successive employers.

For a transfer of rights and obligations contemplated by s. 45 to operate, the fundamental components of an undertaking must be found to exist in whole or in part in the operations of a new employer following "The alienation or operation by another ... in part of" that undertaking.

[emphasis added]

For the Supreme Court of Canada in *Bibeault*, bargaining rights do not follow function, they follow "the undertaking" defined in instrumental or operational terms.

* * *

110. We have referred to these decisions, at length, in order to underline the extent to which the analysis urged upon us by OPSEU has been rejected in other jurisdictions and by this Board under the *Labour Relations Act*. Under all of these statutes in all of these jurisdictions, it has been held that bargaining rights do not follow functions, they follow a coherent part of the organization.

111. OPSEU urges us to reach a different result; and that, in turn, requires us to accept one or more of the following propositions: the mischief under the *Crown Transfers Act* is different from that in other successor rights legislation; the statutory language is sufficiently different from that in any other successor rights legislations to produce a different result; or there is something about the Crown context or civil service bargaining rights which prompted the legislature in 1977 to extend protection to trade unions representing Crown employees which it has not extended to other trade unions in the public or private sectors. And as will be discussed below, OPSEU's bargaining rights may prevail over those rooted in the *Labour Relations Act*, and create conflicts which cannot be resolved because of the way in which the intermingling sections of the *Crown Transfers Act* are framed.

* * *

The Crown Employees Collective Bargaining Act

112. The bargaining rights which OPSEU seeks to follow into the domain of the *Labour Relations Act* and attach to the respondent employer and its employees, originate in the *Crown Employees Collective Bargaining Act*. The details of that legislation are not particularly relevant, save to note that Crown employees are not permitted to strike, and significant aspects of the employer-employee relationship are not subject to collective bargaining at all. Sections 7 and 18 of the *Crown Employees Collective Bargaining Act* read as follows:

7. Upon being granted representation rights, the employee organization is authorized to bargain with the employer on terms and conditions of employment, except as to matters that are exclusively the function of the employer under subsection 18 (1), and, without limiting the generality of the foregoing, including rates of remuneration, hours of work, overtime and other premium allowance for work performed, the mileage rate payable to an employee for miles travelled when he is required to use his own automobile on the employer's business, benefits pertaining to time not worked by employees including paid holidays, pay vacations, group life insurance, health insurance and long-term income protection insurance, promotions, demotions, transfers, lay-offs or reappointments of employees, the procedures applicable to the processing of grievances, the classification and job evaluation system, and the conditions applicable to leaves of absence for other than any elective public office or political activities or training and development.

18.(1) Every collective agreement shall be deemed to provide that it is the exclusive function of the employer to manage, which function, without limiting the generality of the foregoing, includes the right to determine,

- (a) employment, appointment, complement, organization, assignment, discipline, dismissal, suspension, work methods and procedures, kinds and locations of equipment and classification of positions; and
- (b) merit system, training and development, appraisal and superannuation, the governing principles of which are subject to review by the employer with the bargaining agent,

and such matters will not be the subject of collective bargaining nor come within the jurisdiction of a board.

[emphasis added]

113. These provisions remove from the ambit of collective bargaining a whole range of issues which are regularly addressed by parties bargaining under the *Labour Relations Act*. They reflect the special status of the Crown, and the fact that a number of aspects of the employment relationship are governed either by legislation or “the merit principle”. The result, however, is that the OPSEU civil service collective agreement may not contain features which one might expect to find in many agreements bargained under the *Labour Relations Act*; moreover, the Ontario Public Service Labour Relations Tribunal has regularly rejected efforts by OPSEU to negotiate in these restricted areas.

114. One of the restricted areas of collective bargaining is the “contracting out” of bargaining unit work. In *OPSEU v. Crown in the Right of Ontario* (decision #T-19-84, Sept. 6, 1984) and, more recently, in *OPSEU & Crown in the Right of Ontario (Management Board of Cabinet)* (File #T-37-88, July 21, 1989), the Tribunal prohibited union proposals which would restrict the Crown from “contracting out” or removing work from the bargaining unit. The Tribunal held that the union was only allowed to submit proposals which seek to mitigate the effects of subcontracting. The union could not limit the Crown’s right to engage a subcontractor to do work formerly done by Crown employees.

115. In the instant case, therefore, OPSEU cannot bargain restrictions to contracting out of the work to which it says its bargaining rights attach. The statute prohibits any such restriction. Nevertheless, OPSEU claims that, with the passage of the *Crown Transfers Act* in 1977, the Legislature intended that its bargaining rights automatically extend and attach to the subcontractor and its employees doing that work.

116. It is also interesting to note that where there is a merger of unions under the *Crown Employees Collective Bargaining Act* (i.e., a successor union situation) or a merger of bargaining units, or a transfer of employees from one place to another, the *Crown Employees Collective Bargaining Act* contemplates a test of employee wishes before confirming the status of the bargaining agent (see sections 53 and 54 of the *Crown Employees Collective Bargaining Act*). By contrast, OPSEU’s position in this case (supported by the recent Board jurisprudence) is that its bargaining rights attach automatically to employees doing civil servants’ work, whether or not those employees have any previous relationship with, or wish to be represented by OPSEU. Successorship under the *Crown Employees Collective Bargaining Act* leads to a vote to test employee wishes, yet (it is said) under the *Crown Transfers Act*, employee wishes are irrelevant.

* * *

117. A perusal of the schedules attached to the *Crown Employees Collective Bargaining Act* reveals what is probably obvious to anyone familiar with Ontario Government operations: the work and many of the job classifications for civil servants do not differ very much from what one would expect to find among private and public sector undertakings regulated by the *Labour Relations Act*. There are clerks, typists, warehousemen, librarians, child care workers, nurses, secretaries, dietitians, and drivers, just as one would find in the domain of the *Labour Relations Act*. The distinction lies not in what they do - their work function - but the fact that they are employed by the Crown which has historically had special legal status.

118. It is also difficult these days to ascribe intrinsically unique characteristics to the activities

in which “the Crown” itself may be engaged. The Crown undertakes whatever the government of the day decides it should do, without obvious regard to what might be considered “traditional” “government functions”; and a new government inherits the decisions made by its predecessors. The Crown runs book-stores, operates entertainment complexes, and otherwise engages in a whole variety of economic activities which are similar to those which one would find in the “private sector” or more accurately, the broad areas of the “public sector” governed by the *Labour Relations Act*. Again, there is no quintessentially Crown quality about many of these activities, and from time to time the government of the day may decide to discontinue or transfer some of them, take on new ones, or perform established functions in a different way.

119. In fact, it was government decisions of this kind which eventually led to the passage of the *Crown Transfers Act*. The government decided that desirable objectives could be better achieved through different organizational and institutional means, which, in turn, disturbed the collective bargaining status quo. These initiatives deserve some brief consideration, because they illustrate the kind of problem of which the Legislature would have been aware when the *Crown Transfers Act* was passed, and thus give some indication of the mischief the legislation was intended to remedy.

The Crown Transfers Act - Some history

120. In 1975 the Ministry of Health transferred to Metropolitan Toronto the operation of all equipment, vehicles, etc. formerly used by the Province to provide ambulance services in the Metropolitan Toronto area. Approximately 85 employees working for the Ministry of Health were offered employment by Metropolitan Toronto, whose employees were represented by CUPE in a broad “all employee” bargaining unit. As Crown employees, these ambulance workers were represented by the Civil Service Association of Ontario (“CSAO”), (the predecessor of OPSEU), which sought to follow its rights into the territory governed by the *Labour Relations Act*.

121. In order to preserve its bargaining rights, CSAO applied to the Board under what is now section 64 of the *Labour Relations Act*. CSAO asserted that there had been a transfer of part of the Crown’s “business” to Metro, with the result that CSAO’s bargaining rights were preserved in the “like unit” to that which existed prior to the transfer. The provisions of the *Labour Relations Act* upon which CSAO relied are as follows:

64. (1) In this section,

“business” includes a part or parts thereof;

“sells” includes leases, transfers and any other manner of disposition and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
- (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represent the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

CSAO sought to preserve its right to represent a unit of ambulance workers in the Metropolitan Toronto area. It did not succeed.

122. In *Municipality of Metropolitan Toronto*, [1975] OLRB Rep. Oct. 777 the Board found that the successor rights provisions in the *Labour Relations Act* had no application to this transfer from the Crown which was not an “employer” under that Act. There was no bridging provision between the *Crown Employees Collective Bargaining Act* and the *Labour Relations Act* which would catch this Crown Transfer, and the application was therefore dismissed. (The Board noted, in passing, that it would be odd to bind a successor with a collective agreement negotiated under the umbrella of section 18(1) of the *Crown Employees Collective Bargaining Act*, because that agreement would not have the standard employee and management rights that one would expect in a collective agreement in operation under the *Labour Relations Act*.)

The Structure of the Crown Transfers Act

123. The *Crown Transfers Act* was passed in 1977 and provides the bridging feature which the Board found lacking in *Municipality of Metropolitan Toronto*. The terminology and structure of the *Successor Rights (Crown Transfers Act)* have obviously been borrowed heavily from the successor rights provisions in the *Labour Relations Act*. Indeed, much of the language is virtually identical. But there are some important differences. The definition of “transfer” and “undertaking” are not the same as those in the *Labour Relations Act* and there is no provision equivalent to section 64(3) preserving bargaining rights in the “like unit” to that which existed before the transfer.

124. This latter omission prompted the Board to hold that there was no presumption that the bargaining units would continue in the same form. In *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445 the Board said:

18. In this case we have an undertaking being moved from the government sector to what might be called the quasi-public sector. The Crown has relinquished its role of employer and has given it to a public hospital board. Of even more significance is the fact that the collective bargaining structures existing in the two sectors are completely different. It should not be surprising, therefore, that the provisions of *The Successor Rights (Crown Transfers) Act, 1977* contain no reference to “the like bargaining unit” as does section 55 of the *Labour Relations Act*. Where transfer between sectors occurs there can be no presumption, such as was made in *Oshawa Wholesale Ltd.*, *supra*, that existing bargaining units will continue in their same form. In the Board’s view,

the presumption is the opposite - that existing bargaining units must be adapted to fit the bargaining structure of the sector that they have just entered. To take the other approach would be to create an anomalous and unwieldy bargaining structure that would defy all common sense.

Bargaining rights and bargaining units which originated under the *Crown Employees Collective Bargaining Act* were to be restructured in accordance with the criteria applicable under the *Labour Relations Act*. The result in *Owen Sound General and Marine Hospital, supra*, was that the Board took a hospital that had been part of a comprehensive all-employee bargaining unit represented by OPSEU, and revised the bargaining structure to match that prevailing under the *Labour Relations Act*.

125. The Board was not, of course, dealing with a mere transfer of functions, or work which had formerly been done by the Crown and its employees. There was a tangible operation or undertaking with a defined configuration of assets that was transferred into the "private sector". On the other hand, the notion that the bargaining unit should conform to *Labour Relations Act* norms should, at the very least, prompt some questioning when the "thing" supposedly transferred and said to create a succession - *work functions* - would not be considered an appropriate bargaining unit under the *Labour Relations Act*. Under the *Labour Relations Act* an undertaking is not defined as a set of functions or body of work, nor would bargaining rights typically be defined this way.

126. The theory urged upon us by OPSEU does not fit easily with section 4 or 5 of the *Crown Transfers Act*, and in the case of section 5, highlights an anomaly that we will refer to again below: a *transfer of work and workers* will create the pre-conditions for the termination of bargaining rights, while a *transfer of work alone* will not. If some Crown employees are actually "privatized" and find themselves in the domain of the *Labour Relations Act*, there is a good chance that there will be an intermingling which can result in a termination of OPSEU's bargaining rights (see *infra*); however, if no civil servant leaves the civil service to follow "their" work, bargaining rights live on, and attach to a group of strangers - without those strangers having any say in the matter.

127. It seems odd that members of OPSEU who transfer with the work may end up losing bargaining rights, while if the work alone is transferred, employees who have no relationship whatsoever with OPSEU or the Crown end up being represented by OPSEU and bound by the collective agreement when they are doing particular kinds of work (but perhaps not otherwise). It seems odd that the likelihood of a *loss* of bargaining rights is *increased* by the fact that there actually are employees represented by OPSEU who have been "privatized" - that is, if there actually *are* employees who, but for "successor rights" would have lost their bargaining agent.

128. This curious result flows from another difference between the *Labour Relations Act* and the *Crown Transfers Act*: the way in which the intermingling provisions are defined. Section 64(6) of the *Labour Relations Act* reads as follows:

[Intermingling]

64.-(6) Despite subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and the person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);

- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any shall be the bargaining agent or agents for the employees in the unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

129. By contrast, the intermingling provisions of the *Crown Transfers Act* are only available if Crown employees are actually transferred and intermingled with the workers of the transferee employer. If no Crown employee leaves the service of the Crown to follow the work to its new destination, there is no intermingling relief available in the event of conflicting bargaining rights or representation claims. Thus, if the work or functions are sufficient to constitute “part” of an “undertaking” capable of being “transferred” to a successor, and only work is transferred, section 5 “intermingling” relief will not be available to sort out any conflicts raised by unrepresented employees or employees represented by another trade union. For example, unless relief is available under section 4 of the *Crown Transfers Act*, a transfer of work alone would create an island of OPSEU bargaining rights in the midst of a group of unrepresented employees or a bargaining unit of employees represented by another trade union. To be specific: a transfer of “work” from the Crown to a municipality could create an OPSEU island in a CUPE bargaining unit - an island defined by work function - and a potential conflict of bargaining rights for which there may be no obvious statutory solution.

130. There are other odd results. The OPSEU bargaining rights and collective agreement may attach to some activities of some employees some of the time. Thus, if bargaining rights were defined by and confined to the “work” formerly done by civil servants, the OPSEU bargaining unit might not encompass the totality of their activities. Those bargaining rights would not merely be ephemeral - evaporating with the expiry of the contract - they would not encompass the totality of “work” which the employees did.

131. There may be an answer under section 4 of the *Crown Transfers Act*, but it too has its problems. If OPSEU’s bargaining rights were defined on *Labour Relations Act* principles, in all employee terms in accordance with *Labour Relations Act* norms (as *Owen Sound General and Marine* holds is the proper approach), such bargaining rights would necessarily be extended well beyond what was arguably “inherited” from the Crown. The *Crown Transfers Act* would be the vehicle for extending bargaining rights rather than preserving them. And again there would be no intermingling or test of employee wishes. If, on the other hand, bargaining rights are confined to “work”, the bargaining unit that is consistent with that theory will be very strange indeed, with employees moving in and out of the unit, depending upon what they are doing from time to time. And it is not at all clear whether section 4 can apply in the circumstances, or whether the Board could terminate bargaining rights as it can do expressly under section 5.

132. We do not suggest that these problems are insuperable. However, difficulty in applying sections 4 and 5 may throw some light upon the theory that a body of “work” is an “undertaking” capable of being transferred and forming the kind of unit to which the statute envisages bargaining rights will attach. If the results seem curious or the remedial provisions inadequate, it may be because the Legislature never intended a successorship in these situations. The answer may lie in a more traditional interpretation of the terms “transfer” and “undertaking” rather than struggling with a novel construction of section 4 to produce a sensible labour relations result.

* * *

The early Crown Transfer cases

133. Most of the early cases under the *Crown Transfers Act* involve circumstances similar to those in *Metropolitan Toronto, supra*. The Crown decided to move certain institutions and activities from its own territory into the “broader public sector” governed by the *Labour Relations Act*, where employees were typically represented by unions such as CUPE, in broadly-based all-employee bargaining units. *Owen Sound General & Marine Hospital, supra*, involved the transfer of a hospital facility. *Regional Municipality of Sudbury*, [1981] OLRB Rep. March 251 involved the transfer of certain sewage treatment facilities, together with the employees working in those facilities. *Beechgrove Regional Children’s Centre*, [1978] OLRB Rep. Aug. 716 involved the Children and Adolescent Care Unit of the Kingston Psychiatric Hospital (an institution operated by the Crown) which was transferred to the private sector where it continued to operate as a new entity known as Beechgrove. *Regional Municipality of Halton*, [1978] OLRB Rep. Aug. 750 involved the transfer of sewage treatment plants and their operators.

134. None of these cases involved a transfer of work alone. All fell within the ambit of the mischief identified in *Metropolitan Toronto* - the case which preceded and prompted the passage of the *Crown Transfers Act*.

135. Where the transferred institutions and employees were merged into a broader grouping represented by another union, the Board found an “intermingling” and terminated bargaining rights. Following its practice under the successor rights provisions of the *Labour Relations Act*, the Board did not order a representation vote where there was a disparity between the number of employees represented by OPSEU and those already represented by the other trade union (*Regional Municipality of Sudbury*, *Regional Municipality of Halton, supra*). More recently, in *Regional Municipality of Waterloo*, [1985] OLRB Rep. Oct. 1543, a group of employees involved in the administration of part of the family benefits program was transferred along with their duties to the Regional Municipality where the employees were represented by CUPE. Again, the Board found an intermingling and terminated OPSEU’s bargaining rights and collective agreements.

136. The Ontario Public Service Labour Relations Tribunal reached the same result when there was a transfer in the other direction. In its decision T-2-79 there was a transfer of ambulance dispatch services in the Windsor area from a hospital to the Ministry of Health, and the Tribunal terminated the SEIU’s bargaining rights in favour of OPSEU, the bargaining agent for the comprehensive civil service bargaining unit.

137. We repeat: none of these transfers involved the movement of work alone. Even *Waterloo, supra*, involved the constellation of employees who had been formerly engaged in delivering the service and who continued to deliver it under the aegis of their new employer. Were it not for the *Crown Transfers Act*, they would have lost their bargaining agent and collective agreement. However, pursuant to section 5 the Board decided that this was still the appropriate result when they were intermingled with a broader grouping of employees. OPSEU’s bargaining rights were terminated without a representation vote.

138. We mention these examples because the anomaly to which we have referred is by no means hypothetical: in *Regional Municipality of Waterloo*, if only the “work” had been transferred, and that was considered “part” of the Crown’s undertaking, OPSEU’s bargaining rights would have been preserved in respect of that work and there would be no possibility of intermingling relief under section 5 of the *Crown Transfers Act*. But because actual employees had been transferred, the Board found an “intermingling” and terminated OPSEU’s bargaining rights.

The Tribunal Cases

139. Under the *Crown Transfers Act*, the Ontario Labour Relations Board shares jurisdiction to interpret and apply the Act with the Ontario Public Service Labour Relations Tribunal; however, there does not seem to have been the same volume of Crown transfer activity from the “private sector” to the Crown and, with respect, the few cases that are reported are somewhat difficult to reconcile (compare the decision of Chairman Shime in *Woodstock Ambulance Limited*, T-86-84 with that of Vice-Chairman Devlin in *Mississauga Ambulance Service Limited, et al*, in T-0008-85). For present purposes, we need only note that the analytical difficulties posed by this case have also been encountered by our sister Tribunal. Thus, in *Woodstock Ambulance Limited* the Ministry of Health had developed a plan to have a centralized ambulance dispatch service throughout the Province, and this required a transfer of dispatch functions from the “private sector” operators to the Crown. The Tribunal found that there was no successorship - a decision which was eventually reviewed by the Divisional Court, which said this:

“The Ontario Public Service Labour Relations Tribunal, in response to an application by the present applicant trade union [OPSEU] determined that *there had not been a transfer of an undertaking from an employer to the Crown in the case of the assumption of ambulance dispatching functions by the Ministry of Health, which functions had formerly been performed by the respondent companies*. We are asked to quash that decision.”

[emphasis added]

The Court declined to quash the Tribunal’s decision because it was not persuaded that it was “patently unreasonable” (see: *Ontario Public Service Employees Union & Crown in Right of Ontario as represented by the Ministry of Health, Woodstock Ambulance Limited et al*, endorsement released January 11, 1989).

140. We do not cite this decision as definitive because, as we have already noted, there has not been much Crown transfer activity engaging the Tribunal’s attention, and its decisions do not appear to be completely consistent (there is a debate about the significance of the Crown’s licence, reminiscent of that settled by this Board in cases such as *Riverview Manor*, [1983] OLRB Rep. Sept. 1564). We mention this Tribunal decision only to emphasize that it is desirable that the two Tribunals with jurisdiction to interpret the *Crown Transfers Act* should, if possible, adopt a consistent approach; and the Ontario Public Service Labour Relations Tribunal has not unequivocally equated the Crown’s “undertaking” with its “work” or “functions”. If it had adopted this functional approach, *Woodstock Ambulance* would have been decided differently and the Tribunal would have had to go on to consider the question of intermingling as it did in decision T-2-79 (*supra*) which likewise involved a take-over by the Crown of certain ambulance dispatch functions, and, in that case, the dispatchers as well. Since there was no Crown transfer in *Woodstock Ambulance*, there was no need to worry about what the unit was or whether there was “intermingling”.

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141. We turn then to the decisions in *KBM* and *Charmaine’s*, where the Board took the legal analysis in a new direction, defining the mischief and ambit of the *Crown Transfers Act* in a way which had not been articulated in earlier *Crown Transfers Act* cases and in a way that was fundamentally different from the way in which successorship issues had been addressed in Ontario, British Columbia, federally (eventually) or by the Supreme Court of Canada in Quebec.

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KBM, Charmaine's & after

142. The Board's decisions in the group of cases referred to as "*KBM*" and "*Charmaine's*" represent a modification of the analysis, and therefore the impact of, the *Crown Transfers Act*. *KBM* formulated for the first time, the critical proposition that a "part" of the Crown's "undertaking" was the *services that it provided*, so that if another entity performed those services, there was a successorship and consequent extension of OPSEU's bargaining rights.

143. This was the "functional definition" of "undertaking" which, as noted, had not been accepted under the *Labour Relations Act* and related statutes in all other common-law jurisdictions, and was eventually rejected by the Supreme Court of Canada in *Bibeault*. *Charmaine's* carried the "functional analysis" a step further, since it essentially held that, in practice, the *functions* performed by the Crown were indistinguishable from "*the work*" performed by Crown employees, so that if that work was done by someone else, OPSEU's bargaining rights followed and attached to that work.

144. The effect of these decisions was to extend OPSEU's collective agreement and bargaining rights to the employees of all subcontractors who perform services for the Crown of the kind formerly done (or perhaps that might be done) by Crown employees. It creates a kind of proprietary right in work which can be asserted in respect of whoever does it. These decisions represent a significant departure from the former and generally held view of what "successorship" entails.

145. We will therefore look at *KBM* and *Charmaine's* in some detail; however, we should first point out that each of these decisions actually involves a number of files, with quite different facts. The Board's equation of "the undertaking" with its "functions" made it unnecessary to distinguish these various fact situations because, in all of them, a subcontractor and its employees were performing functions which Crown employees had done before. If that was the litmus test, as the Board found it to be, it was unnecessary to distinguish those situations in which the ability to do the work existed independently of the Crown, and those in which the subcontractor's capacity to fulfil the contract, depended upon things that it had acquired from the Crown - tools, equipment, know-how, employees, etc. In other words, the functional test adopted by the Board made it unnecessary to consider whether there would, in any case, have been a successorship on the instrumental analysis enunciated in *Metropolitan Parking*, *Cafas*, and *Bibeault*.

146. We do not propose to analyze the files which were considered along with *KBM* and *Charmaine's*, or to do anything more than point out that some of them may have resulted in a successorship finding on the conventional approach. The instrumental approach already recognizes that the concept of successorship must be adapted to reflect the economic context; moreover, it has already been held that a subcontracting arrangement can amount to a "transfer" of "part" of a "business" where the subcontractor has obtained the facilities necessary to supply the service, as well as the right to do so. Indeed, in the *Labour Relations Act*, the term "sale" includes "a lease" or "any other manner of disposition"; and what is a "lease" of "part" of a "business", but the right to use, for a time, elements of that business organization? Accordingly, in commenting on the results in *KBM* and *Charmaine's*, we should not be taken as casting doubt on the results in any of these other files, nor making any ruling on how they might have been decided had the Board adopted its own approach in *Metropolitan Parking* or the Supreme Court of Canada's approach in *Bibeault*. We simply observe that the result might not have been any different.

* * *

KBM

147. In *KBM* the work in question formed part of a reforestation program undertaken by the Ministry of Natural Resources. It involved the harvesting, bundling, repacking and transplanting of seedlings at a nursery run by the MNR. The Crown decided to “subcontract” these activities for reasons of economy, efficiency and budget, and KBM was selected because it was an established, recognized business. The Board found that KBM “already possesses the expertise, equipment and significant personnel” necessary to fulfil the contract. *KBM* was able to fulfil the contract and perform the functions with its own undertaking as that term is generally understood in labour relations law. *KBM* did not need and did not acquire anything from the Crown.

148. KBM provided from its own organization: all terrain vehicles, special trailers, fold-up tables, flat bed trucks, portable toilet facilities, electrical generation equipment, fold-up tables, and the passenger buses used to transport workers to their workplace. None of these came from the Crown, or were previously “part” of the Crown’s undertaking. Of the 260 employees working on the job, only 18 (7%) had ever worked for the Crown before, in any capacity. Some 97% of the workforce, including the entire supervisory complement, had either worked for KBM before, or were assembled by KBM through its own initiative and the assistance of Employment Canada. The Crown played no role and supplied no assistance.

149. But there was no doubt that KBM was performing functions which, in previous years, the Crown had hired seasonal employees to do.

150. The Board reviewed these facts, then compared the language of the *Crown Transfers Act* with its counterpart under the *Labour Relations Act*. The Board noted that the wording “reflects the nature of certain of the wide range of activities engaged in by Government”. The Board then identified the purpose or “mischief” of the *Crown Transfers Act* this way:

Underlying the legislation is the recognition (a recognition also underlying section 63 of the *Labour Relations Act*) that “the continuity of the work performed before and after the transfer [is of “particular significance”], since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section [63] is to preserve both the bargaining relationship and the collective agreement”: *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, paragraph 32, cited in *The Ministry of Natural Resources, supra*. More specifically in the context of the *Successor Rights (Crown Transfers) Act*, the gains achieved by the union with respect to the jobs which are integral to a particular government program are not to be lost through the government’s transferring that program (and those jobs) to a private entity (and vice versa). From another perspective, it may be said that whatever protections or conditions accrue to those jobs through representation by the union are not to be threatened through the government’s transferring the program or portion of a program, of which they are a part, to a private entity.

[emphasis added]

151. This is, we think, the key passage in *KBM* and the foundation upon which the entire analysis is built. What under the *Labour Relations Act* and other successor rights legislation was an *indicator* of a successorship - a continuity of the work - becomes, in *KBM*, the essential criteria for a Crown transfer. In this passage the Board is clearly attaching the union’s bargaining rights and the “gains” from it (the collective agreement) to the *jobs* that employees do. The union’s bargaining agency is linked to “jobs” rather than to employees or the employer’s undertaking as traditionally defined.

152. This fusion of the jobs and bargaining rights is precisely what the Boards in this and other jurisdictions had repeatedly refused to do (with the Quebec debate conclusively settled by the Supreme Court of Canada in *Bibeault*). However, having made that fusion, it followed that the approach of *Metropolitan Parking, British American Bank Note Co. Ltd.* had to be rejected:

12. It has been held that under section 63, the transfer of work alone does not meet the requirements of the section: see, for example, *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 and *Corporation of the City of Stratford*, [1985] OLRB Rep. June 923. Under section 63, that which may be sold is the predecessor employer's business or portion of a business which has been defined in relation to economic organization, including physical assets, operating personnel and goodwill: *Metropolitan Parking Inc.*, *supra*, and cases cited therein. Under section 2, on the other hand, that which may be transferred or conveyed includes "projects" or "programs" or "work". *We do not necessarily conclude that "work" within the meaning of section 2 means the same type of work as that the transfer of which does not alone satisfy the requirements of section 63, i.e., the performance of labour; more appropriately, work must be read within the context of the word "undertaking". However, it is not necessary for us to decide that issue in this case.* We are satisfied that in this case a "program" or "project" is the most relevant form of undertaking listed in section 2. *A program or project may be defined as the interrelated steps or functions (or "the work") established for the purpose of achieving a particular objective.* The concept of "title" cannot attach to a project or program (although title to equipment or land might pass; however, we have already said that the transfer of either equipment or land is not necessary to a transfer within the meaning of section 2). Here, the Crown is involved in a reforestation project or program, operating out of its Thunder Bay Forest Nursery, and as part of that project or program, it is necessary to harvest seedlings which will later be replanted. A portion of this harvesting, following upon the loosening of the soil and prior to the actual replanting, was, but is no longer, done by the Ministry; it is now done by KBM. The Ministry has transferred (or "disposed" of) that part of the project to KBM, although it retains an interest in ensuring that the work performed by KBM is performed in a manner consistent with the standards established by the Ministry for the reforestation program. That brings it squarely within section 2 of the *Successor Rights (Crown Transfers) Act*. We are satisfied that there has been a continuation of the work and jobs, that OPSEU is the bargaining agent for employees performing that work and that the Crown and OPSEU are parties to a collective agreement applying to that work.

[emphasis added]

153. Although the Board did not necessarily conclude "that a work transfer in itself could trigger a successorship", that was the essence of its analysis as the emphasized sentence in this passage indicates.

154. The dissenting Board Member was of the view that the "general purpose and intent" of the *Crown Transfers Act* was the same as that of the *Labour Relations Act*. For the dissenting Member, the *Crown Transfers Act* was not intended to protect *work*, or attach bargaining rights to *work*, nor did it incorporate a different mischief, purpose or analysis from the one employed under the *Labour Relations Act*. The Legislature did not intend to give civil service unions broader protection than their private and broader public sector counterparts, but merely to redress a legal disability which had been highlighted by the Board in *Metropolitan Toronto*. Since the mischief was the same, the structure of the statute was the same, and much of the statutory language was the same, he was persuaded that the analysis and result should also be the same. The dissenting Board Member thought that the terms "transfer" and "conveyance" used by the Legislature, connoted a transfer of property - or at least something tangible that was "owned" by the Crown. That was also the opinion of the Supreme Court of Canada in *Bibeault*, which held that the ordinary meaning of the word "alienation" found in the Quebec statute was the transfer of ownership of "something" and that "something" was not the right to do work.

155. The Court's analysis is complicated by its parallel consideration of the need for a direct

relationship between the predecessor and successor (i.e., what was also lacking in *Metropolitan Parking*); however, consistent with its view of the meaning of the term “undertaking”, the Court did not consider the right to have work done to be “part” of the “undertaking” capable of being owned and therefore alienated/transferred. In the opinion of Beetz J., the lower Court had wrongly equated the right to perform janitorial services, with “part” of the “undertaking” that had been or could be transferred to the subcontractor. Chief Judge Geoffroy had put it this way:

“In the cases at issue here, the party that in reality gives out the work to be performed is the School Board, and the cleaning of its schools is *its undertaking*. It hired subcontractors to be responsible for operating the undertaking for a limited period (a year)”.

Judge Beaudry was of the same opinion:

“... It is clear that the School Board could confer the right to operate the janitorial service undertaking for which it was (legally) responsible, without itself assuming that undertaking. How could the School Board grant the right to operate the undertaking without first being responsible for it? It is thus the School Board, in accordance with its legal obligation to perform janitorial services, which alone can decide to transfer the operation from one operator to another; and it is the School Board’s original obligation (in whole or in part) that one or other of the operators assumes. The School Board authorizes the arrival of a “new employer” to an undertaking already subject to a certification.”

However, in the Supreme Court’s opinion, *this was wrong*. Beetz J. said, in part:

“With respect, such a conclusion can only result from a misunderstanding of the purposes of section 45 [the successor rights section]. Whatever the merits in terms of purely economic analysis of the argument that the janitorial services undertaking is that of the [School Board] because it is “the party that in reality gives out the work”, the argument finds no place in the context of collective bargaining... Neither can I subscribe to the argument that the legal obligation to provide janitorial services imposed upon [the School Board] is a sufficient basis for affirming that the latter operates a janitorial service undertaking”.

156. There may well be an analytical distinction between the first and subsequent subcontracts, and whether the bargaining rights sought to be preserved were with the owner or a previous subcontractor, but it is inescapable that, for the Supreme Court of Canada in *Bibeault*, the right to have something done was not a “part” of an “undertaking” capable of being “alienated”; and in reaching that conclusion the Court was influenced by the “transfer language” that the Legislature had used.

157. In any event, the dissent in *KBM* highlights the competing views, and paragraph 7 correctly forecast the result. The dissent suggests that on the functional test, “it becomes difficult indeed to think of any instance of subcontracting that would not trigger the section”, and as predicted, one result of *KBM* was an avalanche of Crown Transfer applications wherein OPSEU sought to assert bargaining rights for employees of firms providing services to the Crown. The majority opinion in *KBM* does not prohibit subcontracting as the dissent suggests. But it does appear to automatically bind thousands of employers and employees, quite unexpectedly, to the terms of the OPSEU collective agreement, in circumstances which would not obtain in the case of identical commercial dealings with any other public sector purchaser of those services.

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158. The effect of the *KBM* analysis is highlighted by *KBM* No. 2, in which the parties returned to the Board to seek clarification of the scope of the bargaining rights which the Board had recently extended to the *KBM* operation and its employees. In *KBM* No. 2, the Board found

that there was no intermingling, that the majority of the employees had been hired specifically for the project, that no current employees of the successor worked alongside those employees and that it was irrelevant that the KBM supervisory staff were mixed in with these workers. The Board did not consider it relevant that some of the employees had worked for the Crown in past seasons - presumably, because they were not actively employed at the time the contract was entered into. No former Crown employee actually lost trade union representation. The Board defined the bargaining unit to include all employees of KBM working at the Thunder Bay Nursery, and confirmed OPSEU'S bargaining rights without a representation vote:

OPSEU's right to represent employees doing harvesting work continues, regardless of which individuals are doing the work. New employees, never before hired by the Crown, would be members of the bargaining unit represented by OPSEU once they were hired to do the harvesting in the spring or fall. Similarly, new employees, never before hired by either the Crown or KBM, are members of the bargaining unit represented by OPSEU, once hired to do the harvesting. Accordingly, we decline to exercise the discretion granted us by section 8 to order a representation vote of the employees in the bargaining unit.

159. The dissenting Member would have defined the bargaining unit differently; and noting that only 18 out of 260 employees had even worked at the nursery before, he would have ordered a representation vote before declaring that OPSEU was their bargaining agent. In his opinion, the functional test was inconsistent with previous Board jurisprudence under the *Labour Relations Act*, and was also inconsistent with the notion that employees should have some say in choosing their bargaining agent.

160. *KBM No. 1* was taken on judicial review, but the Court declined to intervene:

"Given the privative provisions of section 11 of the *Successor Rights (Crown Transfers Act)* and section 108 of the *Labour Relations Act*, the award in issue is not subject to judicial review unless patently unreasonable. (See *City of Ottawa Firefighters case*, 58 O.R. (2d) 685). In our view, there can be, as in this case, a disposition of services effecting a transfer under section 2(1) of the Act. Such transfer is consistent with the large range of governmental activity contemplated within the definition of "undertaking" in section 1(h) of the Act. The diversity of such activity goes beyond the concept of "business" as found in section 63 of the Ontario *Labour Relations Act*, and accordingly, the term "undertaking" as found in section 1(h) of the Act, should not be limited by analogy of section 63. In concluding that the reforestation herein [is a] program project work [or] a part of any of them, the award was not patently unreasonable".

There is no reference in this Divisional Court decision to the earlier Divisional Court decision in *Woodstock Ambulance*.

Charmaine's Janitorial Services

161. The *KBM* analysis was developed in the *Charmaine's* group of cases. By this time, *KBM* had been confirmed by the Divisional Court, and in *Charmaine's* the panel once again had to address situations in which certain functions formerly done by the Crown were being done by a subcontractor. The arguments put to the Board, and its response, are recorded in these passages:

19. Counsel for the Crown argued further that the contract between Luckasavitch and the Crown merely entails the transfer of the opportunity to do work and therefore is not encompassed by the *Crown Transfers Act*. Counsel for the union argued strenuously, on the other hand, that the word "work" in clause 1(1)(h) of the Act refers to the performance of labour by the employees, rather than "a work" in the sense of an entity. He relies on *KBM Forestry Consultants*, *supra*, for that proposition; however, the Board in that case specifically declined to deal with the meaning of "work", as it was not necessary to do so, and its reference to "work" in paragraph 12 is a reference to a factor which the cases have recognized as an important consideration in deciding whether there has been a sale of a business, as is clear from paragraph 11

of the decision. While under section 63 the Board has been concerned with whether there has been a transfer of "a functional economic vehicle", and in that sense examines a variety of factors, such as whether there has been the transfer of a logo or of good will or of inventory, or whether the employees of the predecessor company work for the successor company or whether they are performing the same skills, it has also noted in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, at para. 32, that

[o]f particular significance for a labour relations statute is the continuity of the work performed before and after the transfer, since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section [63] is to preserve both the bargaining relationship and the collective agreement. If the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of section [63]... Unless there is a continuation of the work and jobs, it would make little sense to preserve the collective agreement. Accordingly, *the continuity of work done is an important indicium of a transfer of a business.*

[emphasis added]

It is in this context that the Board in *KBM Forestry Consultants Inc.*, *supra*, referred at para. 12 to there being "a continuation of work and jobs" in the transfer of the harvesting of seedlings from the Ministry of Natural Resources to *KBM Forestry Consultants Inc.*

20. The jurisprudence makes it clear that the transfer of work alone does not constitute a sale of a business or part of a business under section 60: *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72, at para. 11 ("Section [63] cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members"); *Metropolitan Parking Inc.*, *supra*, at paras. 36 ("The focus of section [63] is the business entity -- the employer's total economic organization - not simply the work which the employees perform:"); 38 ("A transfer of work, by itself, is simply not enough to ground a section 55 finding.") and 44 ("The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did not do so."); *The Charming Hostess Inc.*, [1982] OLRB Rep. April 536, at para. 33; *The Corporation of the City of Stratford*, [1985] OLRB Rep. June 923.

21. We are of the view that the definition of "undertaking" in clause 1(1)(h) of the Act does not include the mere performance of labour in itself. Clause 1(1)(h) does not state that "undertaking" includes the enumerated words, but rather that it means those words and therefore is limited to them. Where the context does not suggest a contrary intention, given a list of terms in a definitional phrase, the terms should be interpreted with reference to each other (that is, as "of the same kind or nature" or *ejusdem generis*), as counsel for the Crown argues, rather than interpreting one of the terms, here the term "work", as if it were the only term of its own class in a list of terms of another class or classes (that is, "of its own particular kind" or *sui generis*). Furthermore, "work" is part of a list which is preceded by the indefinite article "a" and the most common sense reading of the clause is that "'undertaking' means a ... work or part of [it]". We conclude that the term "work" does not refer in itself to the exertion of labour and that *in and by itself* the performance of labour does not constitute an undertaking.

22. As the Divisional Court indicated in *KBM*, *supra*, however, *the provision of services* may constitute an undertaking within the meaning of clause 1(1)(h) of the *Crown Transfers Act*. The provision of services is, of course, a function integral to modern governments and while it may be difficult to distinguish the provision of services from the performance of labour, in the government context, many programs are comprised in their physical manifestation of little more than the provision of services to the public. The *purpose* of such provision is nevertheless to carry out a government undertaking or part of an undertaking.

23. Thus under section 63, which is concerned with the private sector, the Board has been insistent on ensuring that more than the expenditure of energy or physical exertion be transferred from one entity to another in order for there to be a transfer of a business. It has held that if all that is transferred is the opportunity to do work, there is no transfer; there is no transfer, for

example, if business A has contracted to business B the right to provide labour to carry out some purpose (such as providing personnel to help the predecessor employer run its hospitality portion of its business better: *The Charming Hostess Inc.*, *supra*, para. 37 - 39). For that reason, the Board has spoken of the transfer of assets, goodwill, inventory, customer lists and other indicia of a thriving or once thriving business and has required the some of such indicia be present to find that a business has been transferred. In referring to a "part" of a business, the Board has not been willing to consider the exertion of labour as constituting a "part", but rather has interpreted "part" as a coherent and severable portion of a business, such as one of a chain of stores or a clearly identifiable department in a factory: *Metropolitan Parking Inc.*, *supra*, para. 33.

24. The distinction between "work" and a total business is less easy to make in the government context because of the nature of the undertakings carried on by government. While the purpose of section 63 and that of the *Crown Transfers Act* are analogous, it is not insignificant that the wording of the two provisions are not the same. The Legislature has explicitly recognized that the functions of government place in in the role of employer, but that as an employer it may be engaged in quite different sorts of interests than the private sector, even as it also may be engaged in quite similar interests in form if not in substance; thus the provision of social assistance or of housing and the functions performed by employees in connection with such programs are fundamentally different than the usual private business and the functions carried out by its employees, but the running of a railway or of a bookshop will not outwardly be different whether carried on by a private employer or by government and can be characterized much more easily as a "business" than the provision of social assistance. Yet the provision of social assistance or of housing or the running of a railway or bookstore are all "undertakings" within the meaning of clause 1(1)(h) of the *Crown Transfers Act*.

25. In other words, while the purpose may be the same, the activities encompassed by the two provisions are not similar. Just as "business" and "undertaking" are neither conceptually nor in fact synonymous, the definition of "part" of an undertaking cannot be the same as that of "part" of a "business" but must take into account the different ways in which government carries out its functions and in which it acts as an employer. As "undertaking" is broader than "business", so may "part" of an undertaking be broader than "part" of a business. The notion of a coherent and severable portion of a business, in the sense of one store of many, which is applicable under section 63, is not necessarily appropriately transferred to the *Crown Transfers Act*. A program or project may be comprised of several distinct functions which can be severed but which do not constitute anything resembling a microcosm of the whole. Thus the operation of Algonquin Park consists in providing services to the users of the Park which make the Park's use possible in the first place or more enjoyable or complete, as well as services which enable the government to benefit from the operation of the Park, among other things. These activities are severable in the sense of being easily identifiable as distinct services, but they mean very little on their own and are not analogous to the manner in which the Board has generally defined "part" of a business under section 63. That does not make them any less "part" of the undertaking of operating the Park, however, since in reality the operation of the Park can be seen only as comprised of these different services or functions.

162. In *Charmaine's*, the Board's equation of work and employment relationships relied, for support, on this reference to *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 702:

An important purpose of section [63] is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition.

But *Aircraft Metal Specialists* does not support the proposition attributed to it. First, it was decided at a time when the statute provided no flowthrough of the union's collective agreement. More significantly, the sentence cited by the Board is followed by this one:

In making determinations under section 47a [now 64] therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuation of *the business*.

[emphasis added]

The Board in *Aircraft Metal Specialists* was only prepared to find a successorship if there was a continuation of the undertaking and the Board went on to say:

There is not a continuum between Field [the alleged predecessor] and Aircraft [the alleged successor] in the sense contemplated by the Act. The utilisation of the equipment and a portion of the premises which had formerly been leased by Field do not constitute the sale of a business within the meaning of the Act. In addition, the mere fact that Aircraft has completed certain work under subcontract from Field on a competitive basis, does not in itself constitute the sale of a business. We therefore conclude that in the particular circumstances of this case there has not been a sale of a business, but that is not to say that transactions involving some other combination of assets would not constitute a sale of a business within the meaning of the Act.

163. This case is entirely consistent with the instrumental approach to successorship which came to be applied in Ontario and elsewhere. It clearly links the continuation of bargaining rights to a particular mischief or set of circumstances: *a continuation of the means to perform a business function rather than the function itself*. It provides no support for the result in *Charmaine's* or its analysis.

164. Similarly, to the extent that *Charmaine's* turns upon the notion that there is something intrinsically unique about a Crown function, other than the identity of the Crown and its historical immunities, we note that there is no stated basis for that proposition and the examples to which the Board refers, are not, in fact, unique to a Crown enterprise. Welfare services and housing services are *not* uniquely Crown functions. Municipalities governed by the *Labour Relations Act* typically dispense welfare and housing services. Indeed, it is the very fact that these services are typically performed in the broader public sector which has prompted governments to transfer them from the Crown to organizations which the government of the day thinks can do them better.

165. An analysis of the *Crown Transfers Act* which yields different results than would obtain under the *Labour Relations Act* cannot be founded on an assertion that the Crown performs functions which are quintessentially different from those which are performed by undertakings to which the *Labour Relations Act* applies. They usually are not -although, of course, the nature of the employing entities will be relevant just as they are in cases involving municipalities, school boards, housing authorities or other organizations in the "broader public sector" to which the *Labour Relations Act* applies.

* * *

166. In the *Charmaine's* group of cases, the limitations which at first reading might be thought to flow from the passages from *KBM* reproduced above, were held not significant in the result. There was found to be a Crown transfer to Harold Lukasevitch; and, with respect, it is difficult to see what it was that he acquired other than the opportunity to perform work - in his case, certain maintenance and management functions at a campground. *Charmaine's* itself was a cleaning contractor, and the result in its case is summarized in a single paragraph:

27. With respect to the contract to Charmaine's, Mr. Smith explained that the majority of funds were budgeted for contract work since "the government is looking for alternative means of carrying out its responsibilities" and that "contracting out" has been followed in other provincial parks and it was considered it should also be followed in Algonquin Park. The Crown let out a tender for janitorial services and put an advertisement in newspapers. As the second lowest bidder, Charmaine's was approached when the lowest bidder withdrew two weeks before the start of the contract. The contract between MNR and Charmaine's, covering the period April 29, 1988 to October 10, 1988, gives a detailed description of the work to be performed in Schedule "A". Schedule "B" is a list of the frequency, by specific days (unless "daily") of when various facilities are to be cleaned during specific periods during the summer. These facilities are located along the Highway 60 corridor through the Park. Charmaine's provides the cleaning

equipment and supplies, hires, pays and supervises the five adults and one student employed by it, establishes the wage rates and organizes the work to conform to the contractual format. Private contractors provide janitorial services at eleven of the twenty-nine access points in the Park and such contracts have been in effect over the last five years. In 1988, no employees of MNR do janitorial services except the staff as their own offices and at gatehouses. In 1987, however, the work done at the campgrounds along Highway 60 which are the subject of this application, was done by seasonal staff of the MNR; three of those seven employees are not working for Charmaine's.

28. Charmaine's has contracted with the Crown to provide cleaning services in a particular portion of Algonquin Park. Counsel for the Crown argued that this was merely the transfer of work. On the analysis in paragraphs 21-25 above we reject that submission. The provision of such services, without which the operation of the Park would be undermined, constitutes part of the undertaking carried on by MNR known as Algonquin Park and is therefore encompassed by clause 1(1)(h) of the *Crown Transfers Act*.

167. Charmaine's did not acquire from the Crown the means by which it did the work and since janitorial services are of necessity labour intensive, it is again very difficult to distinguish what it was that Charmaine's did acquire, other than the opportunity to perform work - with its own employee complement. Thus, while the Board in *KBM* suggests that it is "not necessarily" rooting bargaining rights in work or work opportunities, that is, in practice, what the Board appears to have done (compare for example the companion *Moose Creek* case where all of the necessary equipment - heavy machinery worth many thousands of dollars - was provided by the Crown. That "subcontract" might well have been a Crown transfer on the traditional "instrumental" approach, just as it might have led to a successorship under the *Labour Relations Act*).

168. In view of the length of this decision, a brief recapitulation is in order.

169. The instrumental theory of successorship holds that on certification, bargaining rights are attached to an economic vehicle - the mechanism, resources or facilities by which the undertaking serves its purpose, rather than the purpose itself. The Board then tries to determine, from a labour relations perspective, whether the transfer and continuation of some facet of the undertaking requires a continuation of bargaining rights. The Board tries to reach a result which is fair to both the statute and the context under review - that is, what appears to be called for to remedy the mischief. That mischief is not the loss of work or work opportunities, but rather the disruption of bargaining rights which would flow from a change in the ownership of all or part of the elements that make up the business. Bargaining rights are not coextensive with commercial ownership or the continuing identity of the owner, nor does it matter how the new owner comes to have possession of the instruments necessary to carry on all or part of the functions of the predecessor. The cases explore just what those instruments are and what can be said to be the essence of the undertaking - land, equipment, location, employee skills, licences, patents, etc. They consider, from a labour relations perspective, whether a sufficiently-coherent grouping of those things has been transferred so as to warrant a continuation of bargaining rights.

170. By contrast, the Board in *KBM* and *Charmaine's* defines a different mischief: the preservation of work opportunities enjoyed by Crown employees, and finds a successorship when work opportunities are taken up by others. We say *work opportunities*, rather than *work*, because work is an intangible, inseparable from the people who do it. Work, in itself, is not capable of being transferred. It is a potentiality or capacity inherent in what economists now treat as "human capital".

171. The *right to do work* has not been enough to find a successorship under the *Labour Relations Act*, and was held by the Supreme Court in *Bibeault* not to be a "part" of an undertaking capable of transfer, but after *KBM* and *Charmaine's*, it has become a sufficient criterion, by itself.

to warrant a finding of successorship under the *Crown Transfers Act*. The employees of an undertaking doing business with the Crown, therefore, become encompassed by OPSEU's bargaining rights and collective agreement, when they are doing things that Crown employees did or could do. This occurs automatically when the intangible "right to do certain work" is undertaken by their employer. The employer's choice of customer determines who the employees' bargaining agent will be, and automatically supplants their pre-existing terms of employment.

172. The functional approach leaves unanswered the interpretation that should be given to "work" or "work opportunities", which, being intangibles, are particularly difficult to define. It is easy to say that OPSEU's bargaining rights attach to the "work" civil servants do, but that simple sentence involves profound ambiguities and difficulties in application. As the *KBM* and *Charmaine's* fact situations illustrate, the work which Crown employees do or have done, is often undertaken from time to time, and in varying proportions, by other employers, either on a subcontract basis, or because the Crown has shifted responsibilities within the broader public service. Although the Board did not focus on this, some of the fact situations in *Charmaine's* involved Crown employees and subcontractors *working together*; moreover, bodies of work might be done by a group of employees hired by the Crown in a particular place for a limited time, with other similar work done elsewhere, or later, by other groups of employees either hired by the Crown or by a subcontractor whom the Crown engaged to do it. It may be quite difficult to determine just what "work" is OPSEU's "work" and in what proportion.

173. The Board has not been particularly impressed by the "floodgates argument" which is so often raised in response to any legal innovation; however, as we have already pointed out, we do think that it is useful to look at the results flowing from a novel analysis, and the litigation it spawns helps to put the initial policy choice into perspective. It may also prompt the Board to return to the statute and ask whether this is the kind of result which the Legislature intended to flow from the language it has used. If the answer is "no" or the result seems incongruous, that may prompt the Board to reconsider its analysis to see whether there is need for refinement.

Dunning Paving

174. Some of these issues were explored in *Dunning Paving Limited* which accepted and built upon the *KBM/Charmaine's* analysis. In *Dunning* the Board preserved OPSEU's bargaining rights in respect of work even when OPSEU had not in fact asserted those rights in the dozen years since the passage of the *Crown Transfers Act*.

* * *

175. *Dunning Paving*, like *Charmaine's*, actually involved a group of Crown Transfer applications (6 in all). But unlike *KBM* or *Charmaine's*, these applications involved what the Board described as "more mature situations in which the work in question had been contracted out for a number of years". The Board distinguished *KBM* and *Charmaine's* in this regard although it appears from a perusal of the latter cases that, there too, the ministries involved had a historical practice of subcontracting.

176. The issue in *Dunning* was how the *KBM* analysis applied to successive subcontracts and subcontractors, whose employees had never in fact been represented by OPSEU, and whose commercial dealings had never been scrutinized in the years since the passage of the *Crown Transfers Act* in 1977. A related issue involved the fact that Crown employees had never done work or provided services at the particular locations in question. In the case of one subcontractor, Janitorial services had not been provided in respect of the subject building, and the tallying of trees to which another firm's contract applied, had never been done in that geographic area.

177. The respondents argued that OPSEU never actually had a “collective agreement” in respect of employees employed in the “undertaking” - in this particular case because “the work” was different with each contract, geographic area, etc. It was further argued that OPSEU had abandoned any bargaining rights it might have had, and that such failure breaks the chain which might otherwise connect sequential subcontractors (who of course, being competitors, had no direct relationship with each other - see *Metropolitan Parking* and the Supreme Court of Canada’s analysis in *Bibeault*). It was argued that whatever might obtain in a first contracting out situation, there was no reversion, back and forth, binding each new subcontractor in turn, and, in any case, the Board could not bind a subcontractor doing new things or providing new services that Crown employees had never in fact done in the past.

178. The respondents did not attack the decision in *KBM*. As the Board noted at paragraph 52:

It was not suggested in respect of any of the 6 applications presently before us that no “undertaking” was involved. Indeed, counsel for the Crown acknowledged that it would be very difficult to distinguish the subject matter of the contracts in *KBM* and *Charmaine’s* from the subject matter of the contracts in the instant applications.

The functional analysis was accepted as a matter of settled law (*Bibeault* was not then drawn to the Board’s attention) and the Board moved on to consider how it should be applied in the particular circumstances before it.

179. After reviewing the Board’s decisions in *KBM* and *Charmaine’s*, the Board found that the respondent need not have “employees” to be an “employer” within the meaning of section 2(1) of the *Crown Transfers Act*. The Board then gave what it described as a “fair, large and liberal construction and interpretation” to the words of section 2(1) and found that *it was sufficient if Crown employees, somewhere, were doing work of the kind that was the subject of the Crown Transfer applications*:

Snowplowing, garbage pick-up and disposal, janitorial work, operating and maintaining access points, and marking and tallying of trees have been and continued to be performed by Crown employees covered by the collective agreement between the union and the Crown (although the number of Crown employees performing such work has been reduced by contracting out). Without attempting to provide a definitive interpretation of the phrase in question, [“collective agreement with the Crown in respect of employees employed in the undertaking”] we are satisfied that *it is at least broad enough to encompass situations in which the union has historically had, and has at the time at which the contract transfers the undertaking to an employer, a collective agreement with the Crown in respect of Crown employees who perform the type of functions covered by the contract, irrespective of whether such functions are actually being performed at that time...* thus, it is irrelevant (in respect of File No. 2324-88-R) whether the MGS ever used Crown employees to perform janitorial work at the centre, as it is clear from the evidence that it has used and continues to use Crown employees to perform that function at other locations, and that such employees were or are covered by the Crown’s collective agreement. The same is true of tree marking and tallying described above in respect of File No. 1617-88-R... to adopt in such a context the approach suggested by Crown counsel would be to unduly narrow the scope of the Act and force the attainment of its objective of preserving bargaining rights in the context of the transfer of an undertaking from the Crown to an employer.

180. The Board in *Dunning* was drawn to this result as a natural consequence of the functional analysis adopted by the Board in *Charmaine’s* and *KBM*, which at the time *Dunning* was decided was still pending before the Divisional Court on judicial review. The Board reasoned that if the key concept was the *continuity of function*, it should not and did not matter that those functions had been performed by other subcontractors in the past; and if a “part” of the “undertaking”

was the “right” to have the work done, then there was a new Crown transfer with each new sub-contract, and a reversion or extinction of the undertaking when the contract term was completed.

181. In *Dunning #1* the Board was not asked to deal with the unusual results that this analysis entailed: the imposition of a trade union and collective agreement on unrepresented employees who had been doing work for years, bargaining rights that evaporate with the conclusion of the contract, and a reversion to the Crown (perhaps momentarily) of the undertaking and any collective agreement which OPSEU might have been able to negotiate with the subcontractor in the meantime. The respondents’ abandonment argument was dealt with in a single paragraph:

57. In view of our conclusion concerning the scope of section 2(1) of the Act, we find it unnecessary to determine whether or not the Union abandoned bargaining rights in respect of any of the contracts entered into between the Crown and contractors prior to the contracts covered by the instant applications. Assuming without deciding that such abandonment did in fact occur, the Union’s bargaining rights in respect of those undertakings were restored each time in the undertakings reverted to the Crown upon the expiry or termination of the contracts by which they were transferred. (In this regard we reiterate that it was not disputed that, as a matter of law, there can be no abandonment of the bargaining rights which the *Crown Employees Collective Bargaining Act* has conferred upon the Union vis-a-vis the Crown in respect of Crown employees.) Thus, the contracts covered by these six applications each transferred an undertaking from the Crown to an employer at a time at which the union had a collective agreement with the Crown in respect of employees employed in the undertaking, and thereby created a fresh opportunity for an application under the Act unaffected by any earlier abandonment of bargaining rights by the Union.

182. We reiterate that in *Dunning #1* the respondents did not put in issue the analysis in *KBM*. We also point out that there was no authority cited for the proposition that, as a matter of law, there can be no abandonment of bargaining rights under the *Crown Employees Collective Bargaining Act*. In fact, section 25 of that Act provides a better foundation for an abandonment argument than is available under the *Labour Relations Act*, because the Tribunal can terminate bargaining rights where it determines that “the employee organization has ceased to act on behalf of the employees”. It is, of course, for the Tribunal to decide whether OPSEU can abandon bargaining rights by “ceasing to represent” employees in part of the bargaining unit. We note only that we are unaware of any Tribunal decision which explores that possibility. And as we have already pointed out, at least one Tribunal decision did not adopt the functional approach to successorship, and its decision was sustained on judicial review.

* * *

183. *Dunning #2* was a reconsideration of the original *Dunning* decision and was heard together with nine other Crown Transfer applications. As before, these applications involved snow removal, janitorial services, etc. performed by a subcontractor and said to be of the same general nature as the work performed by Crown employees under OPSEU’s omnibus collective agreement with the Crown (covering some fifty - sixty thousand employees throughout Ontario). By this time *Bibeault* had been decided by the Supreme Court of Canada and the Canada Labour Relations Board had recently applied the instrumental approach, holding that there was no successorship when Canada Post “contracted out” certain postal services to retail stores in various communities. However, the Board once again reviewed *Charmaine’s* and *KBM*, and distinguished these new cases on the basis that the definition of “undertaking” in the *Crown Transfers Act* was different from that in either the *Quebec Labour Code* or the *Canada Labour Code*. The Board rejected the submission that the subcontracts under review involved “new work”, holding, as it had in the earlier *Dunning* case, that it was sufficient if the functions covered by the contract were of the same kind as those performed in the past by Crown employees. The requirement under section 2(1) of the *Crown Transfers Act* that the union have a “collective agreement with the Crown in respect of

employees employed in the undertaking was met so long as OPSEU could point to employees within its bargaining unit who performed or had performed the kind of work in question (regeneration surveys, snow removal, etc.).

184. It appears from a recitation of the facts that some of the subcontractor respondents had a range of activities quite apart from the particular subcontracts under review, so that there was at least the possibility that OPSEU bargaining rights would extend to them. Conversely, if those bargaining rights were restricted solely to “the work” involved in the contracts, workers might slip in or out of the bargaining unit (with consequent implications for their terms and conditions of employment and trade union representation) depending upon the season, or the particular work to which they were assigned from time to time. The Board did not consider this labour relations problem, but it did comment at paragraph 30:

Mr. Filion and Ms. Baker posed several questions based upon hypothetical fact situations which give rise to a number of interesting issues. However, it is neither necessary nor appropriate for us to comment on those issues as they are not properly before us for adjudication in these proceedings.

185. The Board then went on to find, *on the agreement of the parties*, and pursuant to section 4(1) of the *Crown Transfers Act*, that the bargaining unit encompassed employees engaged in the functions or services identified in the subcontracts that the Crown had entered into with the various respondents. This way of describing the bargaining unit was later picked up in cases such as *Roots Reforestation (Ontario) Ltd.*, Board File 1331-88-R, in which the panel likewise defined the bargaining unit in respect of the work (hand planting of nursery stock in Fabrough Township in the Blind River District for the period from approximately May 9, 1988 until June 17, 1988, pursuant to Tender No. BL-87-17). This is not the way bargaining units are normally defined under the *Labour Relations Act* (c.f. *Owen Sound General and Marine Hospital*), but to define the unit more broadly than that would extend OPSEU’s bargaining rights even further. And in light of the agreement of the parties, there was no reason to define the bargaining unit any other way.

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The Functional Analysis Revisited

186. In light of the labour relations consequences to which we have referred, the seeming clash with other values recognized by statute, and the widespread acceptance of the instrumental approach to successorship in every other major labour relations statute and jurisdiction, we must ask whether the path the Board took in 1987 was one which was compelled by the language of the *Crown Transfers Act*, and if not, whether it is one which we should continue to follow. To put it another way: does that analysis more probably reflect the legislative intention than the contrary view? Did the Board in *KBM* accurately identify the “mischief” which the *Crown Transfers Act* was designed to redress, and does the definition of the term “undertaking” or the other special features of the *Crown Transfers Act* require an underlying theory of successorship which is different from that embodied in the *Labour Relations Act*?

187. In our view, the answer is no.

188. There is no indication in the history of this legislation to support the assertion that the term “undertaking” means anything much different from the term “business” which appears in the *Labour Relations Act*. *Metropolitan Toronto* which highlighted the legislative gap did not involve a mere transfer of work, nor did any of the other cases following the passage of the *Crown Transfers*

Act. All of these decisions invoked an instrumental approach consistent with that developed under the *Labour Relations Act*.

189. The structure of the *Crown Transfers Act* uses terminology borrowed from the *Labour Relations Act* and this points in precisely the same direction: the mischief and general approach should be the same. In *Owen Sound General and Marine Hospital* the Board indicated the need to harmonize rights under the *Crown Employees Collective Bargaining Act* with the requirements of the legal regime to which those bargaining rights had been transferred. In that case what was required was a restructuring of bargaining units, but the general objective might equally be said to call for an interpretation which, as fairly as possible, gave the two statutes a similar and compatible meaning.

190. We do not think we can discount the unusual results which flow from equating bargaining rights with work, or the apparent inadequacy of sections 4 and 5 of the *Crown Transfers Act* to provide relief. One might say that any remedial difficulty is a legislative oversight; but given the history and statutory scheme, it is more likely that the Legislature really did not envisage an automatic successorship whenever work of the kind once done by Crown employees was undertaken by someone else. Section 5 suggests that, at the very least, employees must be transferred as well.

191. Similarly, section 4(2) of the *Crown Transfers Act* suggests that an undertaking has a "character" which can be changed in the hands of a successor employer in such a way as to warrant a termination of bargaining rights. The functional approach to successorship is very difficult to square with section 4(2) which, conversely, fits rather better with the instrumental approach in which tangible things find their way into the hands of a transferee who might then use them to do something else.

192. It is not obvious to us that the functional approach is what the Legislature intended. It seems odd that it would resist, and prohibit by statute any restrictions on collective bargaining over "contracting out", yet automatically extend OPSEU's bargaining rights to the employees of any subcontractor providing services to the Crown of the kind that it did or could provide for itself. It seems most unlikely that in 1977 the Legislature intended to give Crown employee unions (primarily OPSEU) a monopoly over certain types of work, or to automatically bind any entity that did business with the Crown in respect of that work to the civil service collective agreement. Such impediment to subcontracting should not be lightly inferred, and if that were in fact the Legislature's intention, it could have been accomplished much more simply and directly by referring to "work" to which a union's bargaining rights attach, rather than the language of "works and undertakings" which is reminiscent of the *Labour Relations Act* and the instrumental view.

193. The rights of employees are not always paramount in a framework of institutional collective bargaining. Sometimes the institutional rights of unions must prevail, if orderly collective bargaining is to be maintained, and if rights granted to such unions are to be accorded substance and value. But freedom of choice, majority rule, and free collective bargaining are also labour relations values envisaged by the statute, and the Board must at least pause when the result of its analysis (as in *KBM*) is that hundreds of employees become bound by a collective agreement supplanting their own contracts, and become represented by a trade union with which they have had no previous contact. It is certainly odd (as in *Dunning*) to impose a union and collective agreement upon employees who have been doing the same work, for years, and that is especially so when the bargaining rights thus extended are so curiously circumscribed, tenuous and transitory. It is odd that an employer's choice of customer (perhaps through a bidding process) determines its employees' bargaining agent, and their terms of employment. And it certainly seems odd that established

bargaining rights may be ousted without intermingling relief while the hiring of former Crown employees results in a termination of those bargaining rights.

194. There are also problems of collective agreement administration. It is true that these may arise whenever a “part” of an undertaking is transferred, and it will be up to an arbitrator to decide how the civil service collective agreement will apply to an operation regulated by the *Labour Relations Act*. But it is not without significance that the practical problems are exacerbated by an analysis which requires its application to work (more precisely an “undertaking” defined in terms of work/function). It is not easy to see how the functional theory will actually work, in practice, to preserve OPSEU’s bargaining rights, nor is it easy to see how the usual bargaining process envisaged by the statute can have any operational significance for transferred undertakings defined in this limited way.

195. Finally, does the definition of “undertaking” in the *Crown Transfers Act* itself compel the functional view. We do not think so.

196. In the law of successorship under the *Labour Relations Act* (and other statutes), the word “undertaking” was already in common use and considered more or less synonymous with the term “business” (see for example, *Raymond Cote Limited*, mentioned in *Metropolitan Parking*). It is in that sense that it was used in the *Quebec Labour Code (supra)*, and the cases under the *Labour Relations Act* had extended the ordinary meaning of the word “business” to encompass a variety of public sector organizations and institutions to which the *Labour Relations Act* applied. The term itself was quite broad and flexible.

197. For comparison purposes it may be useful to reiterate language used in these other successor rights statutes - all of which (it has been held) embody the “instrumental approach” to successorship described by this Board in *Metropolitan Parking* and the Supreme Court of Canada in *Bibeault*.

Federal

144(1) “business” means any federal *work, undertaking* or business, and any part thereof;

“sell” in relation to a business, includes the lease transfer and other *disposition* of the business.

Ontario

64. (1) In this section,

“business” includes a part or parts thereof;

“sells” includes leases, transfers and any other manner of disposition and “sold” and “sale” have corresponding meanings.

• • •

Quebec

45. “The alienation or operation by another in whole or in part of an *undertaking*, otherwise than by judicial sale, shall not invalidate any certification...”

Are these so fundamentally different from their equivalent in the *Crown Transfers Act* which reads:

1(1)(f) “transfer” means a conveyance disposition or sale

- (h) “undertaking” means a business enterprise, institution, program, work, or a part of any of them.

We do not think so.

198. One could have said in 1987, therefore, that the words “undertaking” or “part of an undertaking” in the *Crown Transfers Act*, looked at by themselves, denoted the kind of thing that the Supreme Court of Canada was attempting to describe in *Bibeault*: the economic vehicle utilized by the Crown to deliver the goods and services, rather than the goods and services themselves. This reading would have been entirely consistent with the way in which the successorship issue had been traditionally approached, and it would appropriately remedy the mischief to which the successorship concept was originally directed: a loss of bargaining rights consequent upon a change of ownership, and the intrusion into collective bargaining law of common-law notions of privity of contract. Thus, if a hospital, say, were transferred to the domain of the *Labour Relations Act* (*Owen Sound General and Marine Hospital, Beechgrove Children’s Centre*), or there was a transfer of a sewage treatment centre (*Sudbury, Halton*) or there was a transfer of the employee group who make up the delivery system for a group of welfare services (*Waterloo*), OPSEU’S bargaining rights would follow, and issues of bargaining unit definition and representation could be dealt with conventionally under section 4 or 5 of the *Crown Transfers Act* in much the same way and with much the same effect as under the *Labour Relations Act*.

199. The list of words following the term “undertaking” in section 1(h) of the Act, could have been read together, reading one with the other in light of the “statutory mischief” and well-established jurisprudence without in any way generating inconsistency, or requiring a repudiation of the instrumental approach, and without creating a new legal theory of successorship. Words like “business”, “institution”, “enterprise”, “work” or “undertaking” can all sit comfortably together, and together describe the economic vehicle by which the Crown delivers its services: land, buildings, assets, equipment, employee skills and so on. Even the words “program” or “project” can be sensibly read with the others on the list to mean the collection of tools, equipment, employees facilities, know-how, which, together, deliver a particular service that the Crown considers it desirable to provide. They encompass more than the label given to a set of activities or government objectives; they denote rather, the delivery system by which those goals are met (and which, of course, includes the employees who may be represented by a trade union). The words themselves are different than the word “business” in the *Labour Relations Act* (yet not so different when one considers how broadly that term has been interpreted), but they do not require a different underlying concept of what the undertaking encompasses. And those very words “undertaking” and “part” do appear in other successorship statutes that have been given an instrumental interpretation.

200. With respect, there is no reason to believe that the *Crown Transfers Act* - unlike any other successor rights legislation - was intended to protect bargaining unit work, root bargaining rights in work, or to preserve OPSEU’S right to represent anyone doing bargaining unit work. There is, on the contrary, considerable reason to believe that, in 1977, the Legislature had in mind something more limited, as illustrated by the problem posed in *Metropolitan Toronto* to which the *Crown Transfers Act* was a response.

201. In our opinion, what the Legislature attempted to do in section 1(h) of the *Crown Transfers Act* is to define, more precisely, the same concept of an “undertaking” which appears in the *Labour Relations Act* and related successor rights legislation in other jurisdictions. It used language - “institution”, “program”, “project” - that is descriptive of the kind of things that public sector organizations do, without at the same time extending that concept to an entirely different analytical plane. While it might be said that work, or the functions employees perform are in some

sense “part” of what the Crown does, and thus “part” of its “undertaking”, like the Supreme Court of Canada in *Bibeault*, we do not think that is the kind of “part” to which bargaining rights were intended to attach - just as under the *Labour Relations Act* certain assets may be, literally, “part” of a predecessor’s business, but do not constitute a “part” to which bargaining rights attach when the assets (etc.) are transferred to a new employer.

202. In our opinion, a purposive view of the *Crown Transfers Act* does not require the notion that its mischief is the preservation of work opportunities for employees here represented by OPSEU. Rather, it is the preservation of bargaining rights which attach to the undertaking, *not the work*. By misconstruing the mischief, the Board in *KBM* turned a mere test for successorship (albeit an important one) into an irrebuttable finding, and was drawn into constructing a remedy with consequences beyond that which the Legislature intended, and which cannot be easily accommodated under either the terms of the *Crown Transfers Act* itself, or within the established legal framework of the *Labour Relations Act* where the transplanted bargaining rights end up.

203. This is not to say that the result will necessarily be any different when the Board applies the instrumental or operational approach, rather than a functional one. It means only that the mischief, the underlying theory, and the exercise will be the same. It will still be necessary, as it is in the broader public sector, to decide whether what finds its way into the hands of a transferee can be sensibly said to be part of the undertaking from a collective bargaining perspective, having regard to the mischief for which the successorship concept was constructed. In that context, it will be significant whether a “mere subcontractor” has acquired title, possession or use of things without which the contract could not be performed. It will be significant whether “the work” is the same or whether the predecessor’s employees find themselves working for the subcontractor. But nothing much turns on the label “subcontract”, nor need the Board give any weight to the ideological baggage associated with the ongoing debate about “contracting out”. The instrumental approach may even mean that bargaining rights will sometimes attach to employees, just as they would under the *Labour Relations Act* - but that is only because in the service sector, human capital may be the critical element, and constitute a severable “part” of the undertaking, to which bargaining rights can sensibly attach.

204. However, for the foregoing reasons, we decline to follow *KBM* and the line of cases which propound what we have called the “functional” approach to successorship. Rather, we adopt the “instrumental” view developed under the *Labour Relations Act* and affirmed in cases such as *Metropolitan Parking*, *Cafas*, and *Bibeault*.

Do these Subcontracts involve a Crown Transfer

205. For the reasons we have discussed, at length, we do not think that a “Crown Transfer” (i.e. a “transfer” of “part” of the Crown’s “undertaking”) is established merely because an employer finds itself performing certain functions formerly performed or similar to those performed by Crown employees (in this case, at *other* correctional institutions, because civil servants have never done the food service “work” at the ones involved here). Functional correlation may be indicative of successorship, but it is not sufficient by itself. There must be some organizational nexus between the two employers other than the fact that one employed persons to do certain work that the other now does.

206. However, in the cases now before us, there is much more than that. From an “instrumental” or “operational” perspective - what we believe, following *Bibeault*, to be the proper approach to defining an undertaking for successorship purposes - it is evident that the respondent food service firms have acquired from the Crown virtually all of the organizational capacity to provide the food services which are the subject of the contracts. The Crown provides much more than

a venue in which the respondents operate with their own tools, equipment, utensils, employees, expertise, and so on. Virtually all of those elements are derived from the Crown or were left in place by the former subcontractor; and but for the right to use them that the respondent companies have acquired, they could not do the work or perform the functions contracted for. And unlike, for example, a consulting contract where the firm's expertise or "human capital" is a critical element of its organization, here the employees themselves are largely insignificant, acquired almost by happenstance on the departure of a former subcontractor.

207. Virtually every aspect of the operation is prescribed in minute detail or is subject to the direction and control of MCS. The firms are not just given the use of the MCS tools, equipment, kitchens, cafeteria facilities and food, they are told precisely what to do with them, and how to do it. This is not a "contracting *out*" but rather a "contracting *in*", whereby the food service firm is enlisted to provide, in its totality, a core function of the undertaking using the equipment supplied by the Crown to the "customers" defined by the Crown - that is why it must be regulated in such detail, using the tools, equipment, and even the food prescribed by MCS. What has happened here, is that the food service firm has been permitted to take over and run a coherent, identifiable "part" of the institution: a constellation of functions *together with* many of the essential instruments to perform the work, and provide the service to which the contracts relate.

208. In our opinion, the effect of these subcontracts was to put the transferees, for a time, "in possession of [part of] a going concern, the activities of which they could carry on without interruption" - to borrow the words of Widjery J., in *Kenmir v. Frizzel*, *supra*. We find that in each case there has been a "transfer" of "part" of the Crown's "undertaking" to Parnell or Nutritional for the duration of their respective subcontracts.

* * *

Abandonment of OPSEU's Bargaining Rights

209. However, even if we conclude (as we do) that the contracts with these food service companies constitute "Crown Transfers", it does not follow that OPSEU's rights prevail over the rights of employees or the unions which seek to represent them. On the contrary, we find that, *in the circumstances of this case*, OPSEU has abandoned any rights under the *Labour Relations Act* that it may have had by virtue of the *Crown Transfers Act*.

* * *

210. We observe, first of all, that the mere acquisition of a right to represent employees through means mandated by statute (certification, voluntary recognition, successorship) does not preserve those rights, in perpetuity, despite a protracted period of neglect. The legislative scheme under both the *Labour Relations Act* and the *Crown Transfers Act* contemplates that bargaining rights will be exercised and employees will be represented. Indeed, the trade union has a statutory obligation to fairly represent the employees for whom it has bargaining rights (see section 69 of the *Labour Relations Act*, and, for example: *Re: Massicotte, et al & Teamsters Union, Local 938*, 80 CLLC 16,014 - application for judicial review dismissed 119 DLR 3(d) 193 (FCA) and 134 DLR 3(d) (385) (SCC) where it was held that a union's belief that it did not represent particular employees did not erase its statutory obligation to do so).

211. If a union is passive and fails to pursue its right to represent employees, the Board may find, *as a fact*, that it has abandoned its bargaining rights. In *J.S. Mechanical*, [1979] OLRB Rep. Feb. 110, the Board put it this way:

Over the last 20 years the principle of abandonment has been deeply entrenched in the Board's jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote these rights. If a union declines to pursue bargaining rights, it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them to support the appointment of a Conciliation Officer under section 15 of the Act (see *Cooksville Sheet Metal*, [1974] OLRB Rep. June 365; *John Entwistle Construction Limited*, [1972] OLRB Rep. Oct. 919; *Elgin Construction Co. Limited*, [1969] OLRB Rep. April 134; *Guelph Cartage Company*, 55 CLLC ¶18,018). As well, if a union has abandoned its bargaining rights, it may be precluded from relying on them either to bar another agreement that renews itself automatically (see *Catalytic Enterprises Limited*, [1974] OLRB Rep. April 264; *O. & W. Electronics Limited*, [1970] OLRB Rep. Jan. 1213; *Architectural Acoustics & Drywall*, [1970] OLRB Rep. Feb. 1408; *N.W. Clayton Sheetmetal and Heating Co. Ltd.*, [1967] OLRB Rep. April 69), or to require an employer to bargain by giving notice to bargain under such an agreement (see *Rainee Manufacturing Products Limited*, [1967] OLRB Rep. Nov. 796). A union's abandonment might also obviate the necessity for the Board to determine the merits of a termination application (see *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379; *Northern Engineers & Supply Co. Limited*, [1968] OLRB Rep. Oct. 731; *Barrie Tanning Limited*, [1966] OLRB Rep. May 128).

212. This approach was confirmed by the Divisional Court in two related applications: *Re Carpenters District Council of Lake Ontario & Hugh Murray (1974) Ltd. et al*; and *Re Labourers International Union of North America, Local 527 et al and John Entwistle Construction Limited et al*, (1980) 33 O.R. (2d) 670 (Leave to Appeal refused Feb. 2, 1981) (C.A.)). In each case the union had acquired bargaining rights for the employees of an employer, but had subsequently failed to pursue those rights, or actually represent the employees for whom it claimed to be the statutory bargaining agent. The union argued that despite its previous quiescence, it was entitled to reassert its rights because there had been no application (as the statute allows) to terminate them. The union contended that the Board had no jurisdiction to make the finding that it had no bargaining rights, because there was no express power to do so in the statute.

213. The Board disagreed. The Board held that the existence of bargaining rights was a "fact", and that any rights the union once held had, in fact, long since been abandoned - a decision which the Divisional Court considered "eminently sensible and correct in law". The Court went on to say:

It is perfectly obvious that the union is attempting in each of these cases to score a fluky advantage in the application of the 1977 amendments to *The Labour Relations Act*, respecting province-wide agreements in the industrial sector of the construction industry. Having scarcely seen the employees whom they purport to represent for at least 14 years, the unions now seek to have their bargaining rights revived without evidence of any effort on their parts, except their applications to the Board and the applications to this Court.

If the Board's decisions were quashed, the effect in these cases would be that the employees of *Murray (1974)* and *Entwistle* would be saddled for the balance of the terms of the current provincial agreements with bargaining agents who have done nothing for them for the past 14 years or more.

The UFCW and RWDSU make the same observation in this proceeding. They argue that whatever bargaining rights OPSEU may have been able to assert under the *Crown Transfers Act* have been abandoned.

214. The abandonment cases typically involve a union that has been passive for a period during which one would have expected an active assertion of employee rights, either through collective bargaining or a demand that the employer adhere to the terms of a collective agreement. Where the union has been quiescent for an extended period, the Board has concluded that the

union has relinquished its rights, and could not press them vis a vis an employer, a group of employees, or another trade union making a countervailing representation claim.

215. In each case the Board has to make a practical workplace assessment about whether bargaining rights that may once have existed, in fact continue to exist. That depends upon the evidence, and in making that finding, the Board has taken into account such factors as: the period of inactivity; whether the union has made any effort to negotiate or renew a collective agreement; whether the union has sought to administer or apply the collective agreement; whether the terms and conditions of employment have been changed without objection; whether employees have come and gone without intervention by the trade union; whether the exercise of rights long dormant is intended to, or has the effect of blocking the exercise of rights by employees or another trade union; and whether there are any extenuating circumstances to explain the apparent failure to assert bargaining rights. One of these extenuating circumstances might be a union's ignorance of "the law", but in a system designed ultimately to promote the rights of employees, that cannot be a decisive consideration - especially where, as here, the employers and employees for whom OPSEU might have asserted bargaining rights have changed, from time to time, and the employees themselves have expressed their own views.

216. We do not think that the origin of OPSEU's bargaining rights in the *Crown Employees Collective Bargaining Act*, or its reliance on successorship legislation negate the principles of abandonment as developed and applied under the *Labour Relations Act*. There is no policy reason why the notion of abandonment - being essentially a finding of fact - should not apply with equal force regardless of the initial source of the bargaining rights; and, in any event, once bargaining rights are said to exist under the *Labour Relations Act*, they are subject to the considerations and law which apply to that statute. The successorship legislation itself contemplates that interested parties must move with dispatch to clarify the situation and get on with any bargaining that may be required. There is no reason why the Board should not draw the same inference from inaction as it does under the *Labour Relations Act*.

217. There is no established line of authority exploring the notion of "abandonment" in Crown transfer situations or holding that bargaining rights originating in the *Crown Employees Collective Bargaining Act* cannot be abandoned. The argument was set out, at length, in the *Dunning* decision, but the only Board response is para. 57 where it was said:

In view of our conclusion concerning the scope of section 2(1) of the Act, we find it unnecessary to determine whether or not the union abandoned bargaining rights in respect of any of the contracts entered into between the Crown and contractors prior to the contracts covered by the instant applications. Assuming without deciding that such abandonment did in fact occur, the union's bargaining rights in respect of those undertakings were restored each time the undertaking reverted to the Crown upon the expiry or termination of the contracts by which they were transferred. (In this regard we reiterate that it was not disputed that, as a matter of law, there can be no abandonment of the bargaining rights which the *Crown Employees Collective Bargaining Act* has conferred upon the union vis a vis the Crown in respect of Crown employees)...

218. There is, with respect, no authority cited for any of these propositions, and to the extent that they involve a conclusion about what would constitute a transfer *to the Crown*, that is a matter which is to be determined by the Ontario Public Service Labour Relations Tribunal. That is not an easy question where, as here, there has been a series of subcontracts, over the years, to different employers, with shifting groups of employees. For example: do the bargaining rights evaporate when the work is completed; what is it that constitutes the "part of the undertaking" that is "conveyed, disposed of or sold" back to the Crown; and what if, in the interim - as at Guelph - a trade union has acquired bargaining rights? Did the Crown inherit the UFCW agreement that was then

transferred out to Domco - even though the Board found no "sale of a business" as between Domco and Versa Foods?

219. These are controversial issues even if (contrary to *Bibeault*) the right to perform work - a work opportunity - constitutes a "part" of the Crown's "undertaking" capable of being "conveyed, disposed or sold" within the meaning of the *Crown Transfers Act*. Similarly, it is not obvious why the notion of "abandonment", being a finding of fact, has no application under the *Crown Employees Collective Bargaining Act*; and that, too, is a matter for the Tribunal to determine. Conversely, it is this Board that decides whether or not bargaining rights exist under the *Labour Relations Act*.

220. We are not attracted to the proposition that each new subcontract infuses new life into a situation where bargaining rights - if they once existed - have long since been abandoned through neglect and disuse. Certainly it is an unusual labour relations message to suggest that a union can blithely ignore its obligation to represent employees, comfortable in the knowledge that it can always reassert such rights if a new subcontractor arrives on the scene. One might ordinarily have thought that a succession of neglected opportunities would only reinforce the conclusion of abandonment. And if the employees actually terminated OPSEU's rights (as they are entitled to do under the OLRA), would those rights be revived with the arrival of another successful bidder, or the granting of a new contract to the original employer? The theory suggested by *Dunning* is not easy to apply, and has, to say the least, odd labour relations results.

221. To the extent that the decision holds that bargaining rights, once abandoned, can be revived and asserted in the circumstances currently before us, we decline to follow *Dunning*. We do not think we are precluded from determining, as a question of fact, whether there are any subsisting bargaining rights or collective agreements under the *Labour Relations Act* which prevent the UFCW from seeking certification. And, in deciding whether there is such "bar" we think it is legitimate to examine all of the facts - including the opportunities OPSEU may have had in this case to act as bargaining agent for the employees whom it says it represents, and the number of employers, over the years, with whom it might have asserted a bargaining relationship.

* * *

222. In the case of three locations, the subcontracting practices here under review predated the *Crown Transfers Act*. In the other location - Guelph - the subcontracts post-dated the passage of the *Crown Transfers Act*; but there, the employees of the subcontractor then engaged, actually joined the UFCW which was certified by the Board as their bargaining agent. That certificate clearly extinguished any rights which OPSEU might have claimed (but, incidentally illustrates the question about whether these UFCW bargaining rights reverted to and bound the Crown to be later passed on, back and forth, down the chain to each new subcontractor, including, most recently, Parnell).

223. From 1977 until 1990, OPSEU failed to assert any right to represent any of the employees working at any of these institutions, and did not in fact represent them. OPSEU did not bargain on their behalf, and made no effort to apply the collective agreement which it now says was in effect all along or which materialized, sequentially, to bind each subcontractor, as each commercial contract with each subcontractor was consummated. Indeed, when the employees at Maplehurst approached OPSEU seeking representation, they were rebuffed.

224. OPSEU's prolonged inertia was interrupted only when employees at these institutions sought to be represented by another bargaining agent. It is only then that OPSEU asserted the right to represent generic groupings of employees who had been working in correctional institu-

tions for years. It is admitted that OPSEU officials were well aware of these apparently unrepresented employees working in their midst, yet took no steps to assert bargaining rights which had existed on OPSEU's theory since at least 1977.

225. In some respects, the situation in the present case resembles that before the Board in *Marineland of Canada Inc.*, [1990] OLRB Rep. Dec. 1298. There, a trade union acquired bargaining rights in 1976 and asserted that, by operation of law, the bargaining rights had continued over the years through successive rounds of provincial bargaining, with the result that those rights, long neglected, could be relied on in 1990. The Board disagreed. The Board found that the trade union had abandoned its bargaining rights and observed that:

There is no minimum dormant period that must pass before abandonment can be found to have occurred. For example, if weeks after a certificate issued, a union unequivocally stated it had abandoned bargaining rights, the Board might well conclude that bargaining rights had been abandoned as of that time period. Any subsequent period of inactivity by the union would merely be confirmatory of the earlier abandonment period.

The Board found that a period of inaction may confirm an earlier surrender of bargaining rights, and the entire pattern of inactivity had to be considered.

226. We think that this practical approach is applicable here. Even giving weight to the union's ignorance of the law - that is, its belief, based upon the legal opinions it had received, that its bargaining rights did not extend to the employees of subcontractors (see the *Dunning* decision at para. 43 ff) - that position cannot be asserted after the *KBM* decision which issued in March 1987, and certainly not after the issue was crystallized again in *Dunning* in 1989.

227. We do not doubt that OPSEU may have had difficulty coping with the consequences that flowed from the Board's acceptance of OPSEU's legal argument in *KBM*. In view of the legal opinions OPSEU had received, and the clear rejection of its analysis under the *Labour Relations Act*, OPSEU may not have expected to "win" in *KBM*. We also accept that it would be a major task to identify the hundreds of new employers for whose employees OPSEU would be able to assert bargaining rights on the *KBM* theory of successorship or, to put it more accurately, for whom OPSEU *has* always had bargaining rights, because the *Crown Transfers Act* triggers automatically.

228. We accept that there was a legitimate practical dilemma for OPSEU in cases like the present ones when OPSEU never believed it represented the workers, such bargaining rights have never been asserted before, the employees have never been civil servants or otherwise had any connection with OPSEU, and the employees might even be represented by someone else (like the Parnell employees at Elgin-Middlesex who would be represented by RWDSU, or the workers at Guelph who were represented by UFCW). But the fact remains that the subcontracting at these institutions has gone on for years, and the employees of the various subcontractors have worked visibly, and in close proximity, to OPSEU members and local officials. Their presence in the institution is not a surprise, nor following *KBM* can OPSEU plead ignorance of "the law" which it had just "created" by its own successful argument to the OLRB.

229. In our opinion, OPSEU was obliged to actually assert bargaining rights in respect of the employees for whom it claims to be bargaining agent or risk a finding that it has abandoned those rights. If the employees have not, in fact, been represented, the Board may find that they are, in fact, *unrepresented*, and therefore free to join another union (or not) as they wish. To put the matter another way: if OPSEU has, in fact, abandoned its bargaining rights in respect of a group of employees, there will be no impediment to a certification application pursuant to section 5(1) of the *Labour Relations Act* which provides:

5.-(1) Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees in the unit are not bound by a collective agreement, a trade union may, subject to section 62, apply at any time to the Board for certification as bargaining agent of the employees in the unit.

That is the finding we make in this case.

230. We find that there is no “bar” to the three UFCW certification applications now before us, because there is no subsisting collective bargaining relationship or collective agreement covering the employees of the respondents to which the UFCW applications relate. Any bargaining rights which OPSEU might have had, or might have been able to assert, have long since been abandoned.

* * *

231. We come to the same conclusion with respect to the situation at Elgin-Middlesex Detention Centre. By the time OPSEU decided to bring its certification application and Crown transfer application (admittedly contradictory pleadings), its bargaining rights had been abandoned. In this respect, the motivation for the OPSEU certification application was a sound one: OPSEU had no bargaining rights, and in order to establish them, it was necessary to seek certification as the UFCW has done at the other institutions. But at Elgin-Middlesex, Parnell already had a subsisting collective bargaining relationship and a collective agreement with the RWDSU which effectively preceded and precludes the OPSEU certification application. The RWDSU collective agreement already covers a number of Parnell’s activities and employees in Western Ontario, and when the Elgin-Middlesex Detention Centre was added as a new customer, the employees working in that location were an accretion to that established bargaining unit. This collective agreement operates as a bar to any OPSEU certification application.

Disposition

232. We find that the applicant UFCW is a trade union within the meaning of the Act, the certification applications are timely, and there is no bar to entertaining them because there is no subsisting OPSEU agreement or bargaining rights.

233. In respect of the 3 UFCW certification applications, we find the following units to be appropriate for collective bargaining:

Metro West Detention Centre (File 0193-91-R)

Bargaining Unit #1

All employees of Parnell Foods Limited at the Metro West Detention Centre in Metropolitan Toronto, save and except Assistant Managers, persons above the rank of Assistant Manager, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

Bargaining Unit #2

All employees of Parnell Foods Limited at the Metro West Detention Centre in Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except Assistant Manager and persons above the rank of Assistant Manager, office and clerical staff.

Maplehurst Correction Centre (File 0194-91-R)

All employees of *Parnell Foods Limited* at the Maplehurst Correctional Centre in Milton, save and except Assistant Managers and persons above the rank of Assistant Manager, office and clerical staff.

Guelph Correctional Centre (File 0254-91-R)

All employees of *Nutritional Management Services* employed at the Guelph Correctional Centre, save and except managers and persons above the rank of manager.

Clarity Note

For the purpose of clarity, the term “manager” includes the following classifications: Stores Supervisor, Assistant Senior Supervisor, Kitchen Manager and Production Manager.

234. On the basis of the documentary evidence before it, the Board finds that more than fifty-five per cent of the employees of the respondent Parnell in each bargaining unit, at the Metro West Detention Centre and at the Maplehurst Detention Centre, at the time the applications were made, were members of the applicant UFCW on April 29, 1991 and May 2, 1991, the terminal dates fixed for these applications and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

235. Certificates will issue to the applicant UFCW with respect to the bargaining units in Board Files 0193-91-R and 0194-91-R.

236. The UFCW has submitted documentary evidence of membership on behalf of a substantial number of individuals working for Nutritional Management Services Limited at the Guelph Correctional Centre; however, Nutritional asserts that *all* of the persons working there are “managerial”. It is not clear who it is that these individuals allegedly “manage” or why their functions would prohibit them from engaging in collective bargaining if that is their wish. Nutritional is therefore directed to specify in writing the duties and responsibilities of those individuals which Nutritional claims bring them within the ambit of section 1(3)(b) of the Act. (In this regard see: *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121.) If such submission is not received within 30 days of this decision, the Board will act on the basis of the material before it.

237. With respect to the Elgin-Middlesex Detention Centre, the OPSEU application for certification (File 0437-91-R) is dismissed because the employees to whom it relates are bound by the RWDSU agreement which, pursuant to section 5 of the *Labour Relations Act*, operates as a bar to the OPSEU certification application.

238. The OPSEU Crown Transfer application (File 0470-91-R) is also dismissed because, pursuant to section 2, we find that OPSEU had no bargaining rights in respect of any of the employees to whom it relates either before or after Parnell took over from its commercial rival. There were no bargaining rights to preserve.

DECISION OF BOARD MEMBER KAREN S. DAVIES; December 7, 1992

1. I have read the decision of the majority and with respect I must dissent in part.

2. This application is one of a number of cases currently before the Board as test cases for OPSEU in anticipation of a number of further applications. While I agree with the final decision of

the majority, I would continue to follow the jurisprudence set out by the Board in *KBM* and the cases that followed.

3. The majority in this decision defines the mischief in *KBM* and *Charmaine* as the preservation of work opportunities enjoyed by Crown employees (#170, p.113). However, the majority in *KBM* did not deal with that issue and the majority in *Charmaine* came to the opposite conclusion:

We are of the view that the definition of [undertaking] in clause 1(1)(h) of the Act does not include the mere performance of labour in itself.

We conclude that the term [work] does not refer in itself to the exertion of labour and that *in and by itself* the performance of labour does not constitute an undertaking (#21 p.877).

4. At the same time, the Boards in *KBM* and *Charmaine* refused to require a transfer under the *Crown Transfer Act*. In doing so, however they did not completely discard the concept of "total business" or "functional economic vehicle". The Boards arrived at a point between the "mere performance of labour" and a "transfer of assets" which was a modified functional economic vehicle test which could be sensitive to the diversity of Crown undertakings. Each of the cases decided in the *KBM*, *Charmaine*, and *Dunning* constellation of cases found that a Crown transfer had taken place when the transferred work was conducted at a place of operations in which employees in the Crown bargaining unit would have ordinarily performed the work. This is an element of the business carried on by the Crown which can be sufficient in itself to identify a transfer which warrants a continuation of bargaining rights.

5. Here, the employees of *Parnell* and *Nutritional Management Services* at the four correctional institutions involved were performing "work" or "functions" formerly done by Crown employees at a place of operations in which those employees would have ordinarily performed the work. In each case there has been a "transfer" of "part" of the Crown's "undertaking".

COURT PROCEEDINGS

0429-91-U (Court File No. 692/92) Sobeys Inc., Applicant v. United Food and Commercial Workers' International Union, Local 1000A, Respondent

Discharge - Intimidation and Coercion - Judicial Review - Unfair Labour Practice - Board finding employer in violation of the *Act* in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer applying for judicial review of Board's decision and seeking interim relief - Divisional Court staying Board's decision

Board decision reported at [1992] OLRB Rep. Sept. 1020.

Ontario Court of Justice, Divisional Court, Greer J., December 22, 1992.

GREER J.: "This is a garden variety case." So said the counsel for the Respondent, the United Food and Commercial Workers' International Union, Local 1000A ("UFCWIU"). I think not. The Applicant, Sobeys Inc. ("Sobeys") applied for an Interim Stay of the decision of the Ontario Labour Relations Board ("OLRB") rendered on September 16, 1992 between Sobeys and the UFCWIU. The OLRB's decision involved the reinstatement of two employees of Sobeys. The hearing took some nine days in April, 1991. Thirteen witnesses were called, and it took the OLRB 15 months to release its decision. The decision was a 2:1 split in favour of reinstating the two employees, with a very strong dissent being registered by Board Member Sloan. There were a number of facts in dispute between the majority and minority reasons.

The question for the Court to determine is whether an interim stay of the Board's decision should be granted, and thereby keep the two employees in question, Jackie Lease ("Lease") and Chris Taylor ("Taylor"), from returning to the workplace pending the appeal by Sobeys of the Board's decision. I am of the view that such a stay should be granted for the reasons which follow.

Background Facts:

The Sobeys store in question is located in Stratford, Ontario. It has 135 employees, and is one of 125 Sobeys Stores across the country. Sobeys employs approximately 14,000 persons in its Canadian stores. The Stratford store was not unionized when the incidents in question occurred.

In its Stratford operation, the store's most secure place is the front security office. Only 3 of the 135 employees of the store had direct access to this secure location, namely the Store Manager, the Front End Manager, and the Assistant Front End Manager. The secure location was protected by automatic door locks. The store's cash on hand and all confidential store and employee information is protected in this secure area. Anyone else who enters this area, including all department managers, do so under the supervision of one of these persons who have access.

Lease was the Assistant Front End Manager and required access to the secure area in order to prepare work schedules for employees and to have access to the cash for store purposes. Taylor, the other employee in question, was trained in office procedures for relief purposes and thereby had access and a key to this office as well. Both were approached by representatives of the UFCWIU to compile a list of names, addresses and telephone numbers of all employees at the store, and to indicate what was the "probable level of interest in a union". The Union provided them with forms for this purpose and they were to rank employees according to different codes. They did so.

Lease obtained some telephone numbers from a list which she had access to. She also obtained additional numbers from an address book kept by the Front End Manager in a locked drawer. The Majority found:

What Lease had done was copy the initials of the employees name and the last five digits of their phone number from a list which is used to call cashiers and packers into work. As well, she had obtained additional numbers from an address book kept by the Front-end Manager in a locked drawer, to which Lease also had routine access as Assistant Front-end Manager.

Minority member Sloan characterized the incident quite differently. He described it as follows in his reasons:

J. Lease's actions in recording the names and telephone numbers was done in a clandestine, surreptitious manner - including the removal from G. Martin's desk of a "black book" - which was kept under lock and key - to obtain additional telephone numbers - indicate beyond question that J. Lease and C. Taylor knew that what they were doing was wrong and that what they were compiling was more than "... just a list of names".

Discharge was clearly an appropriate response to this serious breach of the company rule.

All employees of Sobeys were given an Employee Orientation Manual which set out in detail the "Confidentiality of Company Information". The manual clearly states that employees must respect the confidentiality of information regarding the Company's employees. It also states that information must only be used for internal use and with discretion. As part of the terms of their employment, both Lease and Taylor had reviewed the Manual and signed a questionnaire given to employees about the contents of the Manual.

The list was left in the Security Office and was discovered by the Store Manager. The managerial staff of Sobeys concluded that if Lease had taken the information on the list from the Security Office, she would be terminated. Lease was terminated. There seems to be some disagreement on the facts as to how it was done. Taylor was not terminated but was excluded from access to the Security Office. Taylor had admitted assisting in compiling the list. Her work was to be restricted to cashier duties only. When she did not return to the store after her lunch break, the acting Store Manager called her home and was informed by her husband that, "Chris will no longer be working for Sobeys". at no time did she give notice to Sobeys nor did she ask to be reinstated. It is agreed that Taylor quit her job with Sobeys.

The Reinstatement:

There appears to be no evidence that either Lease or Taylor were union members. In fact, Sobeys told its employees that they had a right to join a union. The union brought a complaint under section 91 of the *Labour Relations Act* on behalf of Lease, Taylor, and two other employees, that Sobeys had violated certain sections of the Act. The Board found that there was no anti-union motivation with respect to the two other employees, nor was there in its hiring practices generally. The majority found anti-union motivation in the decision to terminate Lease and in its decision to deny Taylor access to the Security Office. It ordered that Lease be reinstated and compensated, and that Taylor be reinstated with access to the front office, if she wished.

Sobeys has appealed the Board's decision and has asked the Court to stay the reinstatements pending the appeal. The UFCWIU takes the position that this is a typical "garden variety" case of reprisal against union activity and that the legal tests are "elementary". It is of the view that Sobeys is unable to establish a strong *prima facie* case of entitlement to the relief being requested. It further points out that board decisions are seldom quashed and that the case involves no defalcation or stolen money. Counsel for the OLRB adopts the union's submissions.

The Law:

Each case must be dealt with on its own merits. To characterize it as a "garden variety" case is, in my view, seriously denigrating the precepts of employee honesty and integrity. The decision of the Board was not unanimous. Member Sloan wrote a very strong minority decision. The majority and the minority views differed on substantial matters.

The Court, when considering a stay, must examine the tests which have been set out in the case law to see if Sobeys has met those tests. In my view, it has.

1. Curial Deference

The level of curial deference to decisions of a tribunal with a strong privative clause has been substantially reduced by recent court decisions. In *Lester v. U.A.J.A.P.P.I., Local 740*, [1990] 3 S.C.R. 644, McLachlin J., on behalf of the majority, carefully analyzes the jurisdiction of the

Board in question and whether the exercise of its jurisdiction was patently unreasonable. (see p.667-9). She points out at p. 670 that, "... the court cannot defer to decisions which are patently unreasonable", and cites Wilson J. in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at 1021. In *Lester*, McLachlin J. outlined in detail the evidence which was before the Board (see p. 696-694) in her determination that the decision of the Board was patently unreasonable.

In the case at bar, Sobeys had no knowledge that Lease and Taylor were taking information from the office and no knowledge of any union activity.

The tests regarding a stay were examined by Lerner J. in *Re Dylex Ltd. and Amalgamated Clothing & Textile Workers Union Toronto Joint Board et al*, (1977), 17 O.R.(2d) 448. At p. 452 he notes that the Board's decision in that case was not unanimous. He further points out that all administrative boards are subject to scrutiny and review by the Courts.

It will be up to the Divisional Court to determine whether the Board made an error, and if so, whether it was jurisdictional or patently unreasonable. (See *Syndicat des Employés de Production de Quebec et de l'Acadie v. C.L.R.B.*, [1984] 2 S.C.R. 412 at 441). I must, however, be satisfied that Sobeys has a case on its merits, and that there is a serious question to be tried. I am satisfied that it has.

2. Irreparable Harm

The Court must also examine whether there will be irreparable harm, and on the balance of convenience, who will suffer more from a granting or a refusal of a stay. The test was set down in *American Cyanamid v. Ethicon Ltd.*, [1975] All E.R. 504. There the Court held at p. 509 that:

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies.

The principles of this case apply to the granting of stays as well as the granting of injunctions. They were adopted in the case of *Re Attorney-General of Manitoba and Metropolitan Stores (MTS) Ltd. et al*, [1987] 38 D.L.R. (4th) 321. The Court held at p. 332:

A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions:

The tests as outlined in the *Metropolitan Stores* case are really the following:

1. Is there a serious question to be determined?
2. Whether the litigant who seeks the stay would, unless the stay is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages.
3. Who will suffer the greatest harm or what is the balance of convenience or inconvenience?

3. Prima Facie or Arguable Case

Counsel for the UFCWIU takes the position that the Applicant must make out a strong *prima facie*

case. He relies on the decision of Steele J. in *Ellis-Don Limited* [1992] OLRB Rep. June 764 (Ontario Court of Justice, Div. Ct.), who held at p. 765 that, "In my opinion, the preponderance of the case law is in favour of the strong *prima facie* case test and I adopt that test." With respect, the *Ellis-Don* situation was quite a different one from the case at bar. There, *Ellis-Don* had applied for judicial review to set aside and quash a decision of the OLRB in which the Board upheld a working agreement executed in 1962, whereby *Ellis-Don* bound itself to hire only unionized sub-contractors. In the case at bar, Sobeys was not even aware that Lease and Taylor were compiling a list for union purposes, nor were they union members, nor was the store unionized. Given those facts, in my view, the test can be that of a serious issue to be tried. I am, however, convinced that Sobeys has met the *prima facie* test for the reasons I have already set out.

Counsel for the Union also made reference to *Wells Fargo Armcar, Inc. v. Ontario Labour Relations Board et al.*, (1981), 34 O.R. (2d) 99 (H.C.J.). Even in that case, Olser J. points out at p.102 that, "... the first criterion normally applied to an application for an injunction, namely the presence or absence of a *prima facie* or at least arguable case, in my view must be given great weight. (emphasis added)

The Court, when looking at all the tests, does look at the Board's experience, as the Board members are the ones who see the witnesses and assess credibility. In the case at bar, it took the Board 15 months before its decision was released and the decision was split, with Board Member Sloan rendering a very strong dissent. The decision was therefore not easily reached. Facts are in dispute. Although counsel for the Union wanted to classify the case as a "garden variety" one, I cannot see how it is. He also said that there was no question of defalcation or of money being stolen from the secure area. One might also say that "lies have no legs." Surely Counsel is aware that had money been taken, the employee would have been charged with theft, not simply terminated for entering the locked drawer and compiling confidential employee information!

Counsel for the Board argued that a Divisional Motions Court Judge is, "... hardly in a position to assess quality of a case where facts are in dispute." With respect, the role is one of determining whether the Applicant has met the tests, as set out in the case law, which would warrant the Court to grant the relief requested. Any assessment of the case is only for the purpose of determining whether a stay should be granted.

Henry J. in *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69 and Ontario Labour Relations Board*, (1984), 2 O.A.C. 227 (Div. Ct.) characterized it at p. 229 as whether the applicant was able to "... show a strong *prima facie* case of entitlement to relief or at the very least a serious issue to be tried." (emphasis added) In that case, counsel left it to the Court to make whatever inferences it saw fit from the evidence before it as to whether there would be irreparable harm or inconvenience or prejudice to the employer in question. In the case at bar, the Union is basically saying that both Lease and Taylor, while the appeal is pending, should be reinstated and again allowed access to the one secure place on the company's premises. It is really asking the Court to ignore the uncontroverted evidence that the locked drawer was entered by Lease, and that Taylor was not terminated but quit. In my view, that is the irreparable harm. If, on appeal, the majority decision of the Board is overturned and the reinstatement overturned, these former employees will have had open access to all confidential information which the company keeps in the secure area. On the other hand, if the Board's decision is upheld on appeal, the two former employees can be financially compensated for the period of their absence from the company.

Conclusion:

Counsel for the UFCWIU would have me believe that by granting the stay, the union organization

could be “strangled at birth”. With respect, there is evidence to show that the company quite clearly told its employees that they could join the union. The Board itself found that there was no evidence of anti-union animus in the company’s hiring practices. The Board’s decision in *DeVilbiss*, [1975] O.L.R.B. Rep. Sept. 678 sets out factors at p. 681 which can be taken into account when a determination is being made as to whether there is anti-union animus. These include:

1. the existence of a pattern of anti-union activity;
2. the extent of the respondent’s knowledge of the existence of union activity and of the employee’s involvement in that activity;
3. the manner in which the employee was discharged;
4. the credibility of the witnesses.

There is no evidence of harm to the UFCWIU in granting the stay. The Respondent holds no bargaining rights for these employees or for any other employees of the company. No application has been made for certification. The company is making no attempts to prevent employees from joining the union. The stay only affects two persons who have been away from the company for over two years at this point in time, the Board having taken 15 months to reach its decision.

An interim Order shall issue staying the implementation of the decision of the Labour Relations Board dated September 16, 1992 in this matter.

Counsel may speak to me with respect to the question of costs.

[This decision has been set aside by a three-judge panel of the Divisional Court. The Court’s reasons for judgment will be reported in [1993] OLRB Rep. Feb.: Editor]

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1992

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3133-89-R: International Brotherhood of Electrical Workers (Applicant) v. Siteco Electric Ltd., Leo Alarie and Sons Limited (Respondents) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all journeymen and apprentice electricians and journeymen apprentice linemen in the employ of Siteco Electric Ltd. and Leo Alarie and Sons Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians in the employ of Siteco Electric Ltd. and Leo Alarie and Sons Limited in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, and the District of Thunder Bay excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3652-91-R: Ontario Public School Teachers Federation (Applicant) v. The Board of Education for the City of Toronto (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all Continuing Education Adult English as a Second Language Lead Instructors, Continuing Education Adult Basic Education Lead Instructors, and Continuing Education Parenting Program Lead Instructors, of The Board of Education for the City of Toronto in the City of Toronto, save and except Lead Team Leaders (3) and employees in bargaining units for whom any trade union held bargaining rights as of the date of application, February 17, 1992" (52 employees in unit) (*Having regard to the agreement of the parties*)

4066-91-R: Service Employees Union Local 268, affiliated with the A.F. of L., C.I.O. and C.L.C. (Applicant) v. Hogarth-Westmount Hospital (Respondent)

Unit: "all office and clerical employees of Hogarth-Westmount Hospital in the City of Thunder Bay regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of March 17, 1992" (6 employees in unit) (*Having regard to the agreement of the parties*)

0866-92-R: Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 30 (Applicants) v. Don Truax Sheet Metal Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all journeymen sheet metal workers and sheet metal apprentices in the employ of Don Truax Sheet Metal Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and sheet metal apprentices in the employ of Don Truax Sheet Metal Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

1553-92-R: Independent Paperworkers of Canada (Applicant) v. Domtar Inc. (Respondent)

Unit: "all employees of Domtar Inc. in its corrugated containers division at its plant in St. Marys, Ontario, save and except foremen, persons above the rank of foreman, office personnel, sales staff, watchmen and guards, and loss control coordinators" (155 employees in unit)

1573-92-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Brant County Roman Catholic Separate School Board (Respondent)

Unit: "all office, clerical and technical employees of the Brant County Roman Catholic Separate School Board in the County of Brant, save and except Supervisors, persons above the rank of Supervisor, Executive Secretary to the Director of Education, Senior Secretary to the Superintendent of Business and Treasurer, Senior Secretary Personnel, Senior Secretary to the Superintendent of Education, Senior Resource Technician and persons for whom any trade union held bargaining rights as of September 1, 1992" (38 employees in unit)

1620-92-R: Canadian Union of Public Employees (Applicant) v. The Royalcrest Lifecare Group Inc. c.o.b. as Marnwood Lifecare Centre (Respondent)

Unit: "all employees employed as Registered or Graduate Nursing Assistants by The Royalcrest Lifecare Group Inc. c.o.b. as Marnwood Lifecare Centre in the Town of Bowmanville, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons for whom any trade union held bargaining rights as of September 1, 1992" (5 employees in unit) (*Having regard to the agreement of the parties*)

1703-92-R: International Brotherhood of Electrical Workers' Local 353 (Applicant) v. Tesla Electric Co. Ltd. and Tesla Electric Construction Limited (Respondent)

Unit: "all journeymen and apprentice electricians in the employ of Tesla Electric Co. Ltd. and Tesla Electric Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians in the employ of Tesla Electric Co. Ltd. and Tesla Electric Construction Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1724-92-R: Canadian Union of Public Employees (Applicant) v. The Lanark, Leeds and Grenville County Roman Catholic Separate School Board (Respondent) v. Group of Employees (Objectors)

Unit #1: (see Bargaining Agents Certified subsequent to a Post-Hearing vote)

Unit #2: "all office and clerical employees of The Lanark, Leeds and Grenville County Roman Catholic Separate School Board regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and pending resolution of the aforementioned dispute by the Board also excluding assistants to a supervisor, persons above the rank of assistant to a supervisor, secretary to the Director of Education, secretary to the Superintendent of Education, and secretary to the Superintendent of Business" (7 employees in unit) (*Having regard to the agreement of the parties*)

1758-92-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Larry's Asphalt Paving Co. Ltd. (Respondent)

Unit: "all construction labourers in the employ of Larry's Asphalt Paving Co. Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Larry's Asphalt Paving Co. Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and

institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1787-92-R: Local 164, Draftmen's Association of Ontario International Federation of Professional and Technical Engineers, A.F.L., C.I.O., C.L.C. (Applicant) v. Asea Brown Boveri Inc. (Respondent) v. Group of Employees (Objectors)

Unit #1: 'all employees of Asea Brown Boveri Inc. located at 201 Woodlawn Road West, Guelph, who are members of the engineering profession entitled to practice in Ontario and employed in a professional capacity, save and except manager, persons above the rank of manager, students employed in a co-operative educational program or during the school vacation period, persons regularly employed for not more than 24 hours per week, and persons employed in the engineering development program" (16 employees in unit)

1842-92-R: Labourers' International Union of North America, (Applicant) v. CRCE Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of CRCE Construction Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1854-92-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Brant County Roman Catholic Separate School Board (Respondent)

Unit #1: "all Teachers' Aids of the Brant County Roman Catholic Separate School Board in the County of Brant, save and except Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than 24 hours per week and persons for whom any trade union held bargaining rights on the date of application September 29, 1992" (17 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see Bargaining Agents Certified subsequent to a Post-Hearing vote)

1994-92-R: United Food & Commercial Workers International Union, A.F.L., C.I.O., C.L.C. (Applicant) v. 727989 Ontario Ltd. c.o.b. Loeb Club Plus Meadowlands (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of 727989 Ontario Ltd. c.o.b. Loeb Club Plus Meadowlands at 200 Grant Carmen Drive in the City of Nepean, save and except Department Managers, persons above the rank of Department Manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (49 employees in unit) (*Having regard to the agreement of the parties*)

1996-92-R: IWA-Canada, Local 2693 (Applicant) v. Corporation of the Town of Longlac (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of Corporation of the Town of Longlac, save and except foremen, persons above the rank of foreman, office and clerical staff, Day Care employees, Medical Clinic employees, students, and special government grant employees" (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: (Representation Vote to be conducted)

2004-92-R: Service Employees International Union, Local 204 (Applicant) v. Fairview Nursing Home Limited (Respondent)

Unit: "all employees of Fairview Nursing Home Limited in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, activationists, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week and students

employed during the school vacation period” (32 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2010-92-R: United Steelworkers of America (Applicant) v. Occupational Health Clinic for Ontario Workers Inc. (Respondent)

Unit: “all employees of the Occupational Health Clinic for Ontario Workers Inc. in the City of Sudbury, save and except Executive Director, persons above the rank of Executive Director and Technical Advisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

2015-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 2391 Lakeshore Road West in the City of Mississauga, save and except Supervisors and persons above the rank of Supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

2016-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 2251 Speakman Drive in the City of Mississauga, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

2017-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 1180 Courtney Park Drive East in the City of Mississauga, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

2018-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 2501 Stanfield Road in the City of Mississauga, save and except Supervisors and persons above the rank of Supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

2025-92-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. Blue Line Taxi Co. Limited (Respondent)

Unit: “all taxi drivers and taxi owners of Blue Line Taxi Co. Limited operating as taxi drivers and/or driver owners at the Ottawa International Airport and licensed by the City of Gloucester, save and except supervisors and dispatchers, persons above the rank of supervisor and dispatcher and office staff” (155 employees in unit) (*Having regard to the agreement of the parties*)

2038-92-R: Canadian Union of Public Employees (Applicant) v. The Lanark, Leeds and Grenville County Roman Catholic Separate School Board (Respondent)

Unit: “all Psychometrists, Speech Pathologists and Computer Technicians of The Lanark, Leeds and Grenville County Roman Catholic Separate School Board, save and except Supervisors, persons above the rank of Supervisor, and persons regularly employed for not more than 24 hours per week” (5 employees in unit) (*Having regard to the agreement of the parties*)

2048-92-R: Labourers’ International Union of North America, Local 1036 (Applicant) v. Shaw Milling Limited (Respondent)

Unit: “all employees of Shaw Milling Limited in the City of Sault Ste. Marie, save and except Foremen, persons above the rank of Foreman, office, clerical and sales staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

2050-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Mossman’s Appliance Parts Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Mossman’s Appliance Parts Limited in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisors, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, office and outside salespersons” (16 employees in unit) (*Having regard to the agreement of the parties*)

2068-92-R: United Steelworkers of America (Applicant) v. Morbern Inc. (Respondent)

Unit: “all employees of Morbern Inc. in the City of Cornwall save and except shift supervisor, persons above the rank of shift supervisor, office, clerical and sales staff and research and development assistants” (200 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2085-92-R: L’Association des enseignantes et des enseignants franco-ontariens (requérant) v. Le Conseil des écoles séparées catholiques du district de Hearst (intimé)

Unit: “les enseignantes et les enseignants suppléants qualifiés à l’emploi du Conseil des écoles séparées catholiques du district de Hearst dans le district de Hearst dans ses écoles élémentaires où le français est la langue d’enseignement en confirmation avec la partie XI de la loi sur l’éducation sauf pour les employés pour qui un autre syndicat détient les droits de représentation et de négociation” (13 employees in unit) (*Having regard to the agreement of the parties*)

2087-92-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. 652605 Ontario Inc. c.o.b. as LOEB I.G.A. Lincoln Heights (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of 652605 Ontario Inc. c.o.b. as LOEB I.G.A. Lincoln Heights in the City of Ottawa, save and except team leaders, those above the rank of team leaders, office and clerical staff, and receivers” (232 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2096-92-R: Canadian Paperworkers Union (Applicant) v. Charles Darrow Housing Co-Operative Inc. (Respondent)

Unit: “all employees of Charles Darrow Housing Co-Operative Inc. in the Town of Aurora, save and except the Board of Directors and persons above the rank of the Board of Director” (3 employees in unit) (*Having regard to the agreement of the parties*)

2098-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 200 Ronson Drive in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

2099-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 1845 Birchmount Road in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor and persons regularly employed for not more than 24 hours per week” (3 employees in unit) (*Having regard to the agreement of the parties*)

2100-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 1121 Leslie Street in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

2101-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 500 Edward Avenue in the Town of Richmond Hill, save and except Supervisors and persons above the rank of Supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

2102-92-R: Laundry & Linen Drivers and Industrial Workers Union Local 847, affiliated with the Interna-

tional Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Goodwill Industries of Toronto (Respondent)

Unit: "all employees of Goodwill Industries of Toronto at its Retail Division at 234 Adelaide Street East in the Municipality of Metropolitan Toronto, save and except Assistant Manager, persons above the rank of Assistant Manager, office, clerical, security and professional staff, persons for whom any trade union held bargaining rights on the day of application (October 19th, 1992), disabled client-employees on the rolls of the Rehabilitation Division, casual employees, and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

2110-92-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. The Board of Education for the City of Etobicoke (Respondent)

Unit #1: "all employees of The Board of Education for the City of Etobicoke in the City of Etobicoke employed in its secondary school cafeterias and Education Centre cafeteria, save and except Supervisor of Food Services and persons above the rank of Supervisor of Food Services, Chef Manager, office and clerical staff, cafeteria attendants, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods, students employed on a co-operative education program from a school, college or university, and persons for whom any trade union held bargaining rights as of October 20, 1992" (41 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all employees of The Board of Education for the City of Etobicoke in the City of Etobicoke regularly employed for not more than 24 hours per week at its secondary school cafeterias and Education Centre cafeteria, save and except Supervisor of Food Services and persons above the rank of Supervisor of Food Services, Chef Manager, office and clerical staff, cafeteria attendants, students employed during the school vacation periods, students employed on a co-operative education program from a school, college or university and persons for whom any trade union held bargaining rights as of October 20, 1992" (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2115-92-R: United Steelworkers of America (Applicant) v. Custom Cryogenic Grinding Corporation (Respondent)

Unit: "all employees of Custom Cryogenic Grinding Corporation in the Town of Waterford, save and except supervisors, persons above the rank of supervisor and office and clerical employees" (31 employees in unit) (*Having regard to the agreement of the parties*)

2125-92-R: Canadian Union of Public Employees (Applicant) v. Quadrille Development Corporation c.o.b. as the Residence on the St. Clair (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of Quadrille Development Corporation carrying on business as The Residence on the St. Clair in the City of Sarnia, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of Quadrille Development Corporation carrying on business as The Residence on The St. Clair in the City of Sarnia regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (28 employees in unit) (*Having regard to the agreement of the parties*)

2135-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. McKelvey Contracting Limited (Respondent)

Unit: "all employees of McKelvey Contracting Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of McKelvey Contracting Limited in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in

the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2148-92-R: International Union, United Automobile, Aerospace & Agricultural Workers of America, U.A.W. (Applicant) v. Morrison's Meat Packers Limited (Respondent)

Unit: "all employees of Morrison's Meat Packers Limited in the Township of North Dumfries, save and except Plant/Production Manager, persons above the rank of Plant/Production Manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (31 employees in unit) (*Having regard to the agreement of the parties*)

2149-92-R: United Food & Commercial Workers International Union, A.F.L., C.I.O., C.L.C. (Applicant) v. 727989 Ontario Limited c.o.b. as Loeb Club Plus Meadowlands (Respondent)

Unit: "all employees of 727989 Ontario Limited c.o.b. as Loeb Club Plus Meadowlands at 200 Grant Carmen Drive in the City of Nepean regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Department Manager, those above the rank of Department Manager, office and clerical staff" (148 employees in unit) (*Having regard to the agreement of the parties*)

2172-92-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. The Hospital for Sick Children (Respondent)

Unit #1: "all security guards employed by The Hospital for Sick Children in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all security guards employed by The Hospital for Sick Children in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2183-92-R: Christian Labour Association of Canada (Applicant) v. Diversicare Incorporated (Respondent)

Unit: "all employees of Diversicare Incorporated at Hudson Manor, 36 Lawson Street, Tilbury, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, recreationist/sales and marketing co-ordinator, office and clerical staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

2184-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Christman & Associates Contractors Ltd. (Respondent)

Unit: "all employees of Christman & Associates Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Christman & Associates Contractors Ltd. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2232-92-R: Service Employees Union, Local 210 (Applicant) v. Exeter Villa (Respondent)

Unit #1: "all employees of Exeter Villa at Exeter Villa in the Town of Exeter, save and except registered nurses, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of Exeter Villa at Exeter Villa in the Town of Exeter regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered nurses, supervisors, persons above the rank of supervisor, office and clerical staff” (33 employees in unit) (*Having regard to the agreement of the parties*)

2237-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 220 Wicksteed Avenue in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

2238-92-R: Canadian Security Union (Applicant) v. Paragon Protection Ltd. (Respondent)

Unit: “all security guards in the employ of Paragon Protection Ltd. at 8000 Dixie Road in the City of Brampton, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

2259-92-R: Retail, Wholesale and Department Store Union (Applicant) v. Weston Bakeries Limited (Respondent)

Unit: “all employees of Weston Bakeries Limited in the City of Sault Ste. Marie, save and except Sales Supervisors, persons above the rank of Sales Supervisor, office staff and merchandiser” (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2280-92-R: Service Employees International Union, Local 204 (Applicant) v. York Region Rose of Sharon Services For Young Mothers (Respondent)

Unit: “all employees of York Region Rose of Sharon Services for Young Mothers in the Regional Municipality of York, save and except Executive Director, Residential Director, Executive Assistant to the Executive Director, Outreach Administrative Assistant, Parent/Child Resource Centre Co-ordinator, Community Outreach/Aftercare Co-ordinator and Children’s Centre Facilitator” (11 employees in unit) (*Having regard to the agreement of the parties*)

2290-92-R: Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers (Applicant) v. Physically Handicapped Adults’ Rehabilitation Association (P.H.A.R.A.) Nipissing - Parry Sound (Respondent)

Unit: “all operators of the Physically Handicapped Adults’ Rehabilitation Association (P.H.A.R.A.) Nipissing - Parry Sound in and out of the City of North Bay regularly employed for not more than 24 hours per week, save and except team leaders, persons above the rank of team leader and persons for whom any trade union held bargaining rights as of November 4, 1992” (3 employees in unit) (*Having regard to the agreement of the parties*)

2303-92-R: IWA-Canada, Local 2693 (Applicant) v. Coretech-Sonoco Limited (Respondent)

Unit: “all employees of Coretech-Sonoco Limited at its plant at Highways 11/17 West and 130 in the Township of Paipoonge, save and except lead hands, persons above the rank of lead hand, office and clerical staff” (9 employees in unit) (*Having regard to the agreement of the parties*)

2311-92-R: Energy and Chemical Workers Union (Applicant) v. 876661 Ontario Limited c.o.b. as Loeb Club Plus Sarnia (Respondent)

Unit: “all employees of 876661 Ontario Limited c.o.b. as Loeb Club Plus Sarnia in the City of Sarnia, save and except Team Leader Produce, Team Leader Grocery, Team Leader Bakery, Team Leader Meat, Team Leader Deli, Team Leader Ready Food, Head Cashier, Grocery Nite Foreman, Promotions Manager, Bookkeeper and persons above the rank of Team Leader Produce, Team Leader Grocery, Team Leader Bakery, Team Leader Meat, Team Leader Deli, Team Leader Ready Food, Head Cashier, Grocery Nite Foreman, Promotions Manager and Bookkeeper” (173 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1647-92-R: IWA - Canada (Applicant) v. Laise Supermarkets Inc. c/o LOEB-Coulter's Mill (Respondent)

Unit: "all employees of Laise Supermarkets Inc. c/o LOEB-Coulter's Mill, at its store at 1450 Clark Ave. West, save and except supervisors, persons above the rank of supervisor and office employees" (101 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	101
Number of persons who cast ballots	76
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	72
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	58
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	4

1900-92-R: United Electrical, Radio and Machine Workers of Canada (UE) (Applicant) v. Creative Pultrusions North Ltd. (Respondent)

Unit: "all employees of Creative Pultrusions North Ltd. in the City of Peterborough, save and except forepersons, those above the rank of forepersons, office staff, salespersons and students employed during the school vacation period" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	16
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	15

2104-92-R: Local 636 of the International Brotherhood of Electrical Workers (Applicant) v. The Hydro Electric Commission of the Town of Orangeville (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all employees of The Hydro Electric Commission of the Town of Orangeville, save and except Supervisors, persons above the rank of Supervisor and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	6

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1530-92-R: Service Employees International Union, Local 204 affiliated with SEIU, A.F. of L., C.I.O., C.L.C. (Applicant) v. Lifestyle Retirement Communities Partnership (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Lifestyle Retirement Communities Partnership c.o.b. as Donway Retirement Residences and Senior Apartments in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (50 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	52
Number of persons listed as in dispute	52

Number of persons who cast ballots	61
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	50
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	10
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	24
Number of ballots segregated and not counted	8

1724-92-R: Canadian Union of Public Employees (Applicant) v. The Lanark, Leeds and Grenville County Roman Catholic Separate School Board (Respondent)

Unit #1: "all office and clerical employees of The Lanark, Leeds and Grenville County Roman Catholic Separate School Board, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, assistant to a superintendent and persons above the rank of assistant to a supervisor, secretary to the Director of Education, secretary to the Superintendent of Education and secretary to the Superintendent of Business" (33 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	4

Unit #2: (see Bargaining Agents Certified without vote)

1854-92-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Brant County Roman Catholic Separate School Board (Respondent)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: "all Teachers' Aids of the Brant County Roman Catholic Separate School Board in the County of Brant, regularly employed for not more than 24 hours per week, save and except Supervisors, persons above the rank of Supervisor and persons for whom any trade union held bargaining rights on the date of application September 29, 1992" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

1967-92-R: Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. Woodstock Public Utility Commission (Respondent)

Unit: "all office, clerical and technical employees of the Woodstock Public Utility Commission in the City of Woodstock, save and except Supervisors, persons above the rank of Supervisor, Executive Secretary to the General Manager and persons for whom any trade union held bargaining rights as of October 8, 1992" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

1104-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Obidos Masonry (Respondent) v. International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Intervener) (15 employees in unit)

1154-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Obidos Masonry Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener) (11 employees in unit)

0598-92-R: Labourers' International Union of North America, Local 493 (Applicant) v. Corporation of the Township of/Canton de Ratter and Dunnet (Respondent) (5 employees in unit)

1438-92-R: Laundry & Linen Drivers & Industrial Workers Union Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Sherwood Electromotion Inc. (Respondent)

Unit: "all employees of Sherwood Electromotion Inc. in the City of Vaughan, save and except Foremen, persons above the rank of Foreman, sales, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (25 employees in unit)

1510-92-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. Franchise Owners Ottawa Limited (Respondent)

Unit: "all employees of Franchise Owners Ottawa Limited, 770 Industrial Avenue in the City of Ottawa, save and except Supervisors, persons above the rank of Supervisor, sales and field representatives" (24 employees in unit)

1575-92-R: The Energy and Chemical Workers Union (Applicant) v. Novacor Chemicals (Canada) Ltd., Corunna Operations (Respondent) v. Group of Employees (Objectors)

Unit: "all operation employees of Novacor Chemicals (Canada) Ltd., Corunna Operations at Corunna, save and except Supervisors, persons above the rank of Supervisor, office, clerical and technical employees, students employed on co-operative work programs and students employed during the school vacation" (296 employees in unit) (*Clarity Note*)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3920-91-R: United Steelworkers of America (Applicant) v. Alros Products Limited c.o.b. as Polytarp Products (Respondent)

Unit #1: "All employees of Alros Products Limited c.o.b. as Polytarp Products in the Municipality of Metropolitan Toronto, save and except Assistant Production Manager, persons above the rank of Assistant Production Manager, office, clerical and sales staff and students employed during the school vacation period." (89 employees in unit)

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	65
Number of spoiled ballots	3

Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	34
Number of ballots segregated and not counted	13

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1402-92-R: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Stinson Security Services Limited (Respondent)

Unit: "all security guards employed by Stinson Security Services Limited in the City of London, save and except supervisors, and persons above the rank of supervisor" (86 employees in unit)

Number of names of persons on revised voters' list	106
Number of persons who cast ballots	63
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	63
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	48

1742-92-R: United Steelworkers of America (Applicant) v. Paul Krohnert Manufacturing Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Paul Krohnert Manufacturing Limited in the Town of Milton, save and except Forepersons, persons above the rank of Foreperson, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (42 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	42
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	20

Applications for Certification Withdrawn

4150-91-R: Labourers International Union of North America, Local 506 (Applicant) v. Crete Flooring Group Limited (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada Local 598 (Intervener)

0228-92-R: International Brotherhood of Electrical Workers, Local 120 (Applicant) v. Pro Electric Inc. (Respondent) v. Construction Workers Local 53, Christian Labour Association of Canada (Intervener)

1505-92-R: GH Metal Stamping Employees Association (Applicant) v. GH Metal Stamping Corporation (Respondent)

1646-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Law Development Group, Law Development Group (Bolton) Limited, Law Development Group (Cambridge) Limited, Law Development Group (1988) Limited, Law Development Group (Mount Albert) Limited, Law Development Group (1989) Limited, Law Development Group (Georgetown) Limited, Law Development Group Georgetown (No. 2) Limited, Law Development Group Georgetown (No. 3) Limited (Respondent)

1885-92-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. 519171 Ontario Limited o/a Aable Construction (Respondent)

1993-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 and, Local 93 (Applicants) v. 755676 ONTARIO INC. c.o.b. Capital Millwork & Renovations (Respondent)

2023-92-R: Service Employees Union, Local 183 (Applicant) v. Briargate Retirement Living Centre (Respondent)

2084-92-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Ontario Jockey Club (at Fort Erie Race Track) (Respondent) v. Service Employees International Union, Local 204 Affiliated with the SEIU, AFL-CIO-CLC (Intervener)

2153-92-R: Administrative Support Employees' Association (Applicant) v. Waterloo Region Roman Catholic Separate School Board (Respondent)

2215-92-R: Teamsters Chemical, Energy and Allied Workers, Local 424 (Applicant) v. A.C.I.C. (Canada) Inc. (Respondent) v. Group of Employees (Objectors)

2231-92-R: Middle Management Staff Association of the Waterloo Region Roman Catholic Separate School Board (Applicant) v. Waterloo Region Roman Catholic Separate School Board (Respondent)

2236-92-R: United Steelworkers of America (Applicant) v. Morbern Inc. (Respondent)

2251-92-R: United Bus Workers of Ontario (Applicant) v. J.I. Denure (Chatham) Limited c.o.b. Cha-Co Trails (Respondent)

2285-92-R: IWA - Canada (Applicant) v. Forestply Industries Inc. (Respondent)

2293-92-R: Canadian Security Union (Applicant) v. Ontario Guard Services Inc. (Respondent) v. Group of Employees (Objectors)

2379-92-R: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Burns International Securities Services Ltd. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2976-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Douglass Refrigeration Inc. and Sartech (Respondents) (*Withdrawn*)

0266-92-R: United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Gall Construction Limited, 925261 Ontario Limited (Respondents) (*Terminated*)

0629-92-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Nickel Belt Aluminum of Sudbury Limited & Gateway Glass & Metals Inc. (Respondents) (*Granted*)

0967-92-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. William S. Burnside (Canada) Limited and Dolyn Developments Inc. (Respondents) (*Withdrawn*)

1657-92-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Aspen Interiors Systems Ltd. and Lorcon Contracting Inc. (Respondents) (*Dismissed*)

1821-92-R: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Modern Wood Fabricators (MWF) Inc. and Algar Plastics (Canada) Ltd. (Respondents) (*Withdrawn*)

1899-92-R: Ontario Secondary School Teachers' Federation (Applicant) v. 772868 Ontario Limited c.o.b. King Square Collegiate and Imperial College of Toronto Inc. (Respondents) (*Withdrawn*)

1970-92-R: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. D-Dixie Drywall Inc. and Country Drywall Inc. (Respondents) (*Dismissed*)

2028-92-R: Hotels, Clubs, Restaurants, Taverns, Employees' Union, Local 261 (Applicant) v. Centennial Group of Companies Limited, York-Hannover Hotels Ltd., 687292 Ontario Limited, Skyline Ottawa Hotel, Skyline Hotels (1980) Ltd. (Respondents) (*Withdrawn*)

2147-92-R: Office and Professional Employees International Union, Local 343 (Applicant) v. Graphic Communications International Union, Locals N1, 10, 466S (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3098-90-R: Ottawa-Carleton Public Employees Union, Local 503 (Applicant) v. Regional Municipality of Ottawa-Carleton and Pinecrest-Queensway Community Services Centre (Respondents) (*Dismissed*)

2976-91-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Douglass Refrigeration Inc. and Sartech (Respondents) (*Withdrawn*)

0264-92-R: United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Gall Construction Limited, 925261 Ontario Limited (Respondents) (*Terminated*)

0629-92-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Nickel Belt Aluminum of Sudbury Limited & Gateway Glass & Metals Inc. (Respondents) (*Granted*)

0967-92-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. William S. Burnside (Canada) Limited, and Dolyn Developments Inc. (Respondents) (*Withdrawn*)

1657-92-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Aspen Interiors Systems Ltd. and Lorcon Contracting Inc. (Respondents) (*Dismissed*)

1821-92-R: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Modern Wood Fabricators (MWF) Inc. and Algar Plastics (Canada) Ltd. (Respondents) (*Withdrawn*)

1898-92-R: Ontario Secondary School Teachers' Federation (Applicant) v. 772868 Ontario Limited c.o.b. King Square Collegiate and Imperial College of Toronto Inc. (Respondents) (*Withdrawn*)

1970-92-R: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. D-Dixie Drywall Inc. and Country Drywall Inc. (Respondents) (*Dismissed*)

2028-92-R: Hotels, Clubs, Restaurants, Taverns, Employees' Union, Local 261 (Applicant) v. Centennial Group of Companies Limited, York-Hannover Hotels Ltd., 687292 Ontario Limited, Skyline Ottawa Hotel, Skyline Hotels (1980) Ltd. (Respondents) (*Withdrawn*)

2132-92-R: Office and Professional Employees International Union, Local 343 (Applicant) v. Graphic Communications International Union, Locals N1, 10C and 466S (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3873-91-R: William Ellis (Applicant) v. Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers' International Association, Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562 and 269 (Respondents) v. Hercon Construction Limited (Intervener)

Unit: "all journeymen and apprentice sheet metal workers, sheeters, sheeters' assistants and material handlers in the employ of Hercon Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (4 employees in unit) (*Granted*)

Number of persons listed as in dispute	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

4146-91-R: Michel Koutsoumbelas (Applicant) v. Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers' International Union, Local 235 (Respondents) v. A & G Metro Roofing Ltd. (Intervener)

Unit: "all employees of A & G Metro Roofing Ltd. performing work covered by the terms and conditions of this Agreement in the Commercial, Industrial and Institutional sectors and new high rise structures in all other sectors, except the work covered in the Collective Agreement of the Electrical Power Systems Construction Association and the Union, of the construction industry in all geographic areas in the Province as described in Appendix "A"" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	1
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1

0042-92-R: Bernard Houle (Applicant) v. International Brotherhood of Painters and Allied Trades (Respondent) v. Nickel Belt Aluminum of Sudbury Limited (Intervener) (*Dismissed*) (2 employees in unit)

0304-92-R: Simone Iaquina (Applicant) v. Ontario Sheet Metal Workers' and Roofers Conference, Sheet Metal Workers' International Association and Sheet Metal Workers' International Association Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562 (Respondent) v. A. & G. Metro Roofing Ltd. (Intervener) (*Withdrawn*)

0335-92-R: John Jordan (Applicant) v. Sheet Metal Workers' International Association, Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 and 562 (Respondent) v. Walden Roofing & Sheet Metal Co. Limited (Intervener)

Unit: "all employees of Walden Roofing & Sheet Metal Co. Limited performing work covered by the terms and conditions of this agreement in the commercial, industrial and institutional sectors and new-high rise structures in all other sectors, except the work covered in the collective agreement of the Electrical Power Systems Construction Association and the union, of the construction industry in all geographic areas in the Province of Ontario" (10 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	5

0408-92-R: Stephen Myers (Applicant) v. Sheet Metal Workers' International Association, the Ontario Sheet Metal Workers' Conference and Affiliated Bargaining Agents Locals 30, 47, 235, 269, 392, 397, 473, 504, 537, 539, 562 (Respondent) v. Industrial Metal Fabricators Limited (Intervener)

Unit: "all journeyman sheet metal workers, registered apprentices, sheeters, deckers, welders, sheeters' assistants and material handlers employed by Industrial Metal Fabricators Limited in the industrial, commercial

and institutional sector of the construction industry in the Province of Ontario, save and except non-working Foremen and persons above the rank of non-working Foreman” (8 employees in unit) (*Withdrawn*)

1668-92-R: Grew Canada Inc. Employees (Applicant) v. C.A.W. (Respondent)

Unit: “all employees of Grew Canada Inc. employed at its Boat Division in Penetanguishene, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (25 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	17

1838-92-R: Richard Hartley (Applicant) v. Labourers' International Union of North America Local 183 (Respondent) v. Great World Properties Limited (Intervener) (*Withdrawn*)

1841-92-R: Rick DeJong, Gordon Woodward and Ernie Fleetwood (Applicant) v. Amalgamated Transit Union Local 1624 (Respondent) v. Trentway-Wagar Inc. (Intervener) (21 employees in unit) (*Dismissed*)

2138-92-R: Robert Gosselin, Al Haines, Phil Christie, Leo Lavallee and Ernie Belanger (Applicant) v. United Steelworkers of America (Respondent) v. Dellece Construction & Equipment (Intervener) (5 employees in unit) (*Granted*)

2175-92-R: Donna Sonier (Applicant) v. United Steelworkers of America, Local 6363 (Respondent) v. Neelon Casting Limited (Intervener) (3 employees in unit) (*Granted*)

2274-92-R: Barun Kuma Roy and Melvin Cragg (Applicants) v. United Steelworkers of America Local 16506 (Respondent) v. Diamond Canapower Division of Babcock & Wilcox Industries Ltd. (Intervener) (*Withdrawn*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

1969-92-M: United Food & Commercial Workers' Union, Local 175 (Trade Union) v. Multi-Restaurants Inc. (Employer) (*Terminated*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2223-92-U: Western Iron & Steel Company, Limited (Applicant) v. United Steelworkers of America, Local 14045 and Rick Chaborek, Richard Masse, Kevin Hopps, Jay Hardaker, Marvin Seguin, Washington Carbellio, Andre Giroux, Wayne Sauve, Sr. and Robert Marentette (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1979-89-U: Canadian Paperworkers Union (Complainant) v. Boise Cascade Canada Ltd., L & N Enterprises, R & W Timber Ltd., Querel Gravel and Lumber Ltd., Devlin Timber Co. Ltd., Therrien Forest Products Ltd., Dave Bert General Contractors Ltd., Regional Logging Industries (1979) Ltd., 432919 Ontario Inc., Quinella Timber Ltd., Irish Lake Logging Limited, Clarke Anderson Logging (Respondents) (*Withdrawn*)

1896-90-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) (Complainant) v. Kautex of Canada Inc. (Respondent) (*Granted*)

2519-91-U: John Lucescu (Complainant) v. United Steelworkers of America (Respondent) v. Marsh Engineering Ltd. (Intervener) (*Dismissed*)

3755-91-U: Labourers International Union of North America, Ontario Provincial District Council (Complainant) v. Stephens and Rankin Inc., Christian Labour Association of Canada (Respondents) (*Withdrawn*)

4012-91-U: Professional Institute Staff Association (Complainant) v. The Professional Institute of the Public Service of Canada (Respondent) (*Withdrawn*)

4079-91-U; 1867-92-U: United Steelworkers of America (Complainant) v. Alros Products Limited c.o.b. as Polytarp Products (Respondent) (*Withdrawn*)

4114-91-U: Torino Drywall Services (Complainant) v. International Brotherhood of Painters and Allied Trades Local 1891 (Respondent) (*Withdrawn*)

0243-92-U; 0782-92-U: Operative Plasterers' and Cement Masons International Association of the United States and Canada Local 598 (Complainant) v. Labourers' International Union of North America Local 506, Crete Flooring Group Limited (Respondents); Labourers' International Union of North America, Local 506 (Complainant) v. Crete Flooring Group Limited and Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Respondents) (*Withdrawn*)

0429-92-U: Sheet Metal Workers' International Association, Local 540 (Complainant) v. Imperial Surgical Inc. (Respondent) (*Withdrawn*)

0652-92-U: Teamsters Local Union No. 419 (Complainant) v. Safety Kleen Canada Inc. c.o.b. as Safety Kleen Oil Services (Respondent) (*Withdrawn*)

0668-92-U: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Complainant) v. Jumec Construction (Respondent) (*Withdrawn*)

0713-92-U: Southern Ontario Newspaper Guild, Local 87 (Complainant) v. Thomson Newspapers Corporation, The Cambridge Reporter, a division of Thomson Newspapers Corporation (Respondents) (*Withdrawn*)

0715-92-U: Mark Herrington (Complainant) v. Canadian Union of Public Employees Local 2840 (Respondent) v. Board of Governors of Exhibition Place (Intervener) (*Dismissed*)

0833-92-U: Ontario Public Service Employees Union and its Local 334 (Complainant) v. Peterborough Youth Services (Respondent) (*Withdrawn*)

0856-92-U: Ontario Public Service Employees Union (Complainant) v. Royal Ottawa Health Care Groups/Services De Sante Royal Ottawa (Respondent) (*Dismissed*)

1007-92-U: Members of I.B.E.W. Local 1230 at Grace Hospital Windsor (Complainant) v. IBEW Local 1230, Executive, Business Manager and Stewards (Respondent) (*Withdrawn*)

1102-92-U: Ibrahim Mikhael (Complainant) v. Amalgamated Transit Union Ottawa-Carleton Regional Transit Commission (Respondent) (*Withdrawn*)

1214-92-U: Navdeep Gill (Complainant) v. Amalgamated Clothing and Textile Workers Union AFL-CIO-CLC, and Local 1967, Gary Walton (Respondents) (*Withdrawn*)

1359-92-U: Ontario Public Service Employees Union (Complainant) v. The Corporation of the County of Grey (Respondent) (*Withdrawn*)

1439-92-U: Laundry & Linen Drivers & Industrial Workers Union Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Sherwood Electromotion Inc. (Respondent) (*Withdrawn*)

1529-92-U: Paul Formosa (Complainant) v. General Motors of Canada and CAW Local 222 (Respondents) (*Withdrawn*)

1593-92-U: IWA - Canada (Complainant) v. 669184 Ontario Inc. c.o.b. Sherwood Record Management Systems (Respondent) (*Withdrawn*)

1645-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Complainant) v. Marsh Food Services (Respondent) (*Withdrawn*)

1655-92-U: International Brotherhood of Electrical Workers, Local 353 (Complainant) v. Fordyce and Framp-ton Electrical Contractors Limited (Respondent) (*Withdrawn*)

1727-92-U; 1895-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. 947465 Ontario Limited c.o.b. as Checker Limousine and Airport Service (Respondent) (*Withdrawn*)

1829-92-U: Rance Tremblett (Complainant) v. Wilson Truck Lines Ltd. and The Canadian Union of Drivers & General Workers (Respondents) (*Dismissed*)

1843-92-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 124 (Complainant) v. Titan Wheel International Ltd. (Respondent) (*Withdrawn*)

1858-92-U: Mark Secord (Complainant) v. William Day Construction Ltd., Gogama Forest Products (Re-spondent) (*Withdrawn*)

1922-92-U: John Grant (Complainant) v. City of Toronto - Union Local 43 (Respondent) v. City of Toronto (Intervener) (*Dismissed*)

1944-92-U: Hotel Employees Restaurant Employees Union, Local 75 (Complainant) v. Oliver's Brasserie Bofinger (Respondent) (*Withdrawn*)

1957-92-U: KRC Rolls (Canada) Inc. (Complainant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

1959-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. O'Toole's Roadhouse Restaurant (Respondent) (*Withdrawn*)

1983-92-U: Teamsters Local Union 419 (Complainant) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

2041-92-U: Glass, Molders, Pottery, Plastics & Allied Workers International Union (Complainant) v. Penin-sula Plastics Limited (Respondent) (*Withdrawn*)

2044-92-U: Crane Canada Inc., Crane Supply Division Hamilton, Ontario Branch (Complainant) v. Team-sters Local 879 (Respondent) (*Withdrawn*)

2071-92-U: Canute Anderson (Complainant) v. Ron Sutherland, Teamsters Joint Council #52 (Respondents) (*Withdrawn*)

2077-92-U: Energy & Chemical Workers Union (Complainant) v. Entreprise Desmarais Forever Entreprise (Respondent) (*Withdrawn*)

2088-92-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. 652605 Ontario Inc. c.o.b. as LOEB I.G.A. Lincoln Heights (Respondent) (*Withdrawn*)

2108-92-U: International Union of Operating Engineers Local 793 (Complainant) v. Bellai Brothers Ltd. and Gary Burke (Respondents) (*Withdrawn*)

2127-92-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Complainant) v. Bren Mechanical Contractors Limited (Respondent) (*Withdrawn*)

2136-92-U: Office and Professional Employees International Union - Local 520 (Complainant) v. Underwriters' Laboratories of Canada (Respondent) (*Withdrawn*)

2141-92-U: Jennie S. Dale (Complainant) v. G.S.W. Heating Products, U.S.W.A. Local Union No. 13704 6E (Respondents) (*Withdrawn*)

2275-92-U: Roger Boyer (Complainant) v. Canadian Brotherhood of Railway, Transport and General Workers Local 518 (Respondent) (*Withdrawn*)

2399-92-U: Len Sukdeo (Complainant) v. Schneider Employees' Association (Respondent) (*Withdrawn*)

2402-92-U: International Union of Operating Engineers Local 793 (Complainant) v. Bellai Brothers Ltd. (Respondent) (*Withdrawn*)

2529-92-U: Office and Professional Employees International Union, Local 343 (Complainant) v. Auto Workers (Oshawa) Credit Union (Respondent) (*Withdrawn*)

TRUSTEESHIP

0498-92-T: Re: International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) and Shopmen's Local Union No. 734 (Respondent) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0258-91-M: Ontario Public Service Employees Union (Applicant) v. Elizabeth Bruyere Health Centre (Respondent) (*Withdrawn*)

1210-91-M: St. Joseph's General Hospital (Applicant) v. Ontario Nurses Association (Respondent) (*Withdrawn*)

3036-91-M: Ottawa Board of Education (Applicant) v. Canadian Union of Public Employees Local 1400 (Respondent) (*Granted*)

0463-92-M: York County Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

2012-92-M: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (C.L.C., A.F.L.-C.I.O.) (Applicant) v. Oxford University Press Canada (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3395-90-OH: Frederick K. Dzierzanowski (Complainant) v. McDonalds Rest. of Canada Ltd. (Respondent) (*Terminated*)

1114-92-OH: Andrew H. Mitton (Complainant) v. Flint Ink Corp. (Respondent) v. René N. Meiller (Intervener) (*Withdrawn*)

1317-92-OH: Alejandro Chavarrio (Complainant) v. Lees Hamilton Limited (Respondent) (*Withdrawn*)

1696-92-OH: United Steelworkers of America (Complainant) v. Eurocollection Canada Ltd. (Respondent) (*Withdrawn*)

1736-92-OH: Margaret Robertson (Complainant) v. Woolco (Respondent) (*Withdrawn*)

2106-92-OH: Ontario Public Service Employees Union and John Thompson (Complainant) v. Mr. Newman - Ministry of Transportation (Respondent) (*Withdrawn*)

2190-92-OH: Carmon George Nichols (Complainant) v. Nash and Nash Contracting (Respondent) (*Withdrawn*)

2228-92-OH: Wayne Clements (Complainant) v. J.M. Schneider Inc. (Respondent) (*Withdrawn*)

2250-92-OH: John Tait (Complainant) v. Fred Facca (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2033-91-G: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1590 (Applicant) v. VTC Industrial Coatings Limited (Respondent) (*Withdrawn*)

2645-91-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) v. International Brotherhood of Painters and Allied Trades (Intervener) (*Withdrawn*)

2956-91-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Kinell Construction Co. Limited and Kinell Forming Limited (Respondents) (*Granted*)

2965-91-G: International Association of Bridge, Structural & Ornamental Ironworkers Local 786 (Applicant) v. 724705 Ontario Inc. (Respondent) (*Dismissed*)

3734-91-G: International Union of Electrical Workers Local 353 (Applicant) v. Black & McDonald Limited (Respondent) (*Withdrawn*)

4004-91-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Applicant) v. Ken Acton Plumbing and Heating Inc. (Respondent) (*Withdrawn*)

0265-92-G: United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Gall Construction Limited and 925261 Ontario Limited (Respondents) (*Terminated*)

0535-92-G; 0536-92-G; 2154-92-G: The Millwright District Council of Ontario on its own behalf and on behalf of its Local 1244 (Applicant) v. Canadian Machinery Movers Limited (Respondent) (*Granted*)

0825-92-G: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bondfield Construction (Respondent) (*Withdrawn*)

0968-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. William S. Burnside (Canada) Limited and Dolyn Developments Inc. (Respondents) (*Withdrawn*)

0986-92-G: International Brotherhood of Painters and Allied Trades Local 1904 (Applicant) v. Nickel Belt Aluminum of Sudbury Limited (Respondents) (*Granted*)

0996-92-G: Labourers' International Union of North America, Local 183 (Applicant) v. Viewmark Homes Ltd. (Respondent) (*Withdrawn*)

1015-92-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Bondfield Construction Co. Ltd., (Respondent) (*Granted*)

1295-92-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Rocco Carpentry & Construction Ltd. (Respondent) (*Granted*)

1368-92-G: International Brotherhood of Painters & Allied Trades Local 1824 Painters (Applicant) v. National Painting & Decorating (Hamilton) Inc. (Respondent) (*Withdrawn*)

1587-92-G: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Modern Wood Fabricators (MWF) Inc. (Respondent) (*Withdrawn*)

1610-92-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Gaspo Construction Ltd. (Respondent) (*Granted*)

1614-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041

(Applicant) v. Les Entreprises Somi Inc. Construction General (Respondent) (*Withdrawn*)

1757-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. A.B.T. Tile & Marble Co. (Respondent) (*Withdrawn*)

1771-92-G: United Brotherhood of Carpenters and Joiners of America Local 1988 (Applicant) v. MCY Construction (1989) Ltd. (Respondent) (*Withdrawn*)

1776-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bellai Brothers Ltd. (Respondent) (*Withdrawn*)

1856-92-G: United Brotherhood of Carpenters and Joiners of America Local 2041 (Applicant) v. Standard Drywall Limited (Respondent) (*Granted*)

1958-92-G: Labourers' International Union of North America, Local 183 (Applicant) v. Andrew Paving & Engineering Ltd. (Respondent) (*Granted*)

1985-92-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Baxcan Construction Limited (Respondent) (*Withdrawn*)

1998-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. B. Gerlach and Son Enterprises Inc. (Respondent) (*Granted*)

2026-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Vincent Spirito and Sons Ltd. (Respondent) (*Granted*)

2037-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bono General Construction Ltd. (Respondent) (*Withdrawn*)

2042-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Peterborough Reinforcing Steel Ltd. (Respondent) (*Granted*)

2055-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Ogden Charters Electric Ltd. (Respondent) (*Granted*)

2056-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Granted*)

2057-92-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Vale Electric (Respondent) (*Granted*)

2059-92-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Corporation of the City of Toronto (Respondent) (*Withdrawn*)

2061-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. C.P.M. Paving Company (Respondent) (*Withdrawn*)

2062-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Permanent Lafarge (Respondent) (*Withdrawn*)

2090-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. True North Installations Inc. (Respondent) (*Granted*)

2103-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bellai Brothers Ltd. (Respondent) (*Withdrawn*)

2112-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. Northwest Excavating Limited and Northwest Earthmoving Inc. (Respondents) (*Granted*)

2119-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Vie-Bilt General Contractors (Respondent) (*Withdrawn*)

2126-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Bren Mechanical Contractors Limited (Respondent) (*Withdrawn*)

2131-92-G: International Union of Operating Engineers, Local 793 (Applicant) v. 582232 Ontario Limited o/a Sierra Landscaping (Respondent) (*Granted*)

2157-92-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Coolsaet of Canada (Respondent) (*Withdrawn*)

2166-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Danhart Mechanical Contractors Inc. and Danhart Mechanical Inc. (Respondent) (*Granted*)

2167-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. P.C. Installations (Respondent) (*Withdrawn*)

2168-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ashbri Industries (Respondent) (*Withdrawn*)

2169-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. T.B. Kerr Construction Inc. (Respondent) (*Withdrawn*)

2170-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mississauga Cement Forming Ltd. (Respondent) (*Withdrawn*)

2171-92-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. All-Wood Contracting Ltd. (Respondent) (*Granted*)

2174-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. MDB Mechanical Contractors (Respondent) (*Withdrawn*)

2188-92-G: Labourers' International Union of North America, Local 183 (Applicant) v. G.M. Paving (1985) Ltd. (Respondent) (*Granted*)

2208-92-G: Christian Labour Association of Canada (Applicant) v. Pro Electric Inc. (Respondent) (*Withdrawn*)

2220-92-G: International Brotherhood of Carpenters and Joiners America, Local 2041 (Applicant) v. Dry-coustic Construction Ltd. (Respondent) (*Granted*)

2245-92-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Gaspo Construction Ltd. (Respondent) (*Granted*)

2246-92-G: Drywall Acoustic Lathing and Insulation, Local 675 (Applicant) v. David's Grovedale Construction Limited (Respondent) (*Granted*)

2248-92-G: Drywall Acoustic Lathing and Insulation, Local 675 (Applicant) v. Eastern Drywall and Acoustics (Respondent) (*Granted*)

2264-92-G: United Brotherhood of Carpenters and Joiners of America Local Union 27 (Applicant) v. U-Flor-ric Contracting (Respondent) (*Withdrawn*)

2269-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. A & A Rebar Placers Ltd. (Respondent) (*Granted*)

2278-92-G: Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Cerveira Trimming Co. Ltd. (Respondent) (*Granted*)

2320-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Wesbrook Construction Ltd. (Respondent) (*Withdrawn*)

2321-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Ottawa Structural Concrete Services Ltd. (Respondent) (*Withdrawn*)

2323-92-G: International Brotherhood of Painters and Allied Trades District Council 46 (Applicant) v. Sky-line Painting & Decorating Limited (Respondent) (*Granted*)

2325-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Bectar Corporation (Respondent) (*Withdrawn*)

2326-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. A.B.T. Tile & Marble Ltd. (Respondent) (*Withdrawn*)

2327-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Set Construction Ltd. (Respondent) (*Withdrawn*)

2329-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Torchline Welding Corporation (Respondent) (*Withdrawn*)

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cation's terminal date is to have that intervener application governed by "original" application's application and terminal dates

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Adjournment - Construction Industry - Construction Industry Grievance - Board rejecting employer submission that balance of convenience favouring granting adjournment and that it may suffer substantial and potentially irreparable prejudice if adjournment not granted - Adjournment request denied

ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 105 (Nov.) 1191

Adjournment - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Applicant union resisting employer and intervener union's request that Board defer consideration of grievance to allow filing of jurisdictional dispute complaint - Board seeing no reason why jurisdictional dispute forum not appropriate to deal with situation where work assignment given by contractor to trade with which it does not have collective agreement - Grievance adjourned and to be listed with pending jurisdictional dispute

ELLIS-DON CONSTRUCTION LTD.; RE P.A.T.; RE B.S.O.I.W., LOCAL 736 . (Oct.) 1071

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MUNICIPALITY OF METROPOLITAN TORONTO; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A. (July) 817

Adjournment - Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Board declining to allow respondent union to make preliminary objection where it had not been included in the union's pre-hearing brief in accordance with Practice Note #15 - Board not allowing respondent union to lead evidence with respect to area practice where union neglected to include job or project lists in its pre-hearing brief - Board allowing evidence of employer practice throughout the province (and not exclusively in Board Area 3) - Having regard to parties consenting to adjourn 12 of 13 days set by Board for hearing, Board declining to set further hearing dates unless request received within 1 month - Board indicating that there will be no consultation with the parties with respect to available dates

ELLIS-DON LIMITED AND O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059 AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL (June) 695

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ACME PLUMBING & HEATING, VINCENT J. TRUDEAU & SONS INC. C.O.B. AS, AND 883553 ONTARIO INC. C.O.B. AS ACME BIVALENT SYSTEMS; RE U.A., LOCAL 463 (Jan.) 1

- Adjournment - Discharge - Health and Safety - Remedies - Witness - Employer seeking adjournment of four continuation hearing dates on the ground that he could not afford to bring witnesses away from work to the hearing and because he had several important meetings to attend to - Board denying adjournment request, employer departing and hearing continuing in absence of employer - On the basis of the evidence before it, Board satisfied that complainant discharged, at least in part, because he gave evidence in an earlier Board proceeding involving his employer and an other employee, in violation of section 50(1) of the *Occupational Health and Safety Act* - Complaint upheld, damages quantified and awarded, and employer directed to post Board's decision in the workplace
 WHITLER INDUSTRIES LIMITED; RE ROGER KENNEDY(Aug.) 977
- Adjournment - Duty of Fair Representation - Unfair Labour Practice - Complainants alleging that process leading to Pay Equity Plan with employer unfair and biased against certain employees in computing and technical classifications - Board denying union's motion to dismiss complaint for failure to plead *prima facie* case - Board also dismissing complainants' motion to adjourn pending disposition of related court proceeding
 JOHN HUNTLEY, PEGGY NG, ROD POTTER, MAJELLA POWER-O'CONNOR, LANCE RANKIN, ERIKS RUGELIS, JAMIE SPENCE, VERONICA TIMM, CARLOS M. MARQUES, JOHN G. CURRELL, TONY D'AGOSTINO AND DAVIE COLLIER-BROWN; RE THE YORK UNIVERSITY STAFF ASSOCIATION(Nov.) 1193
- Adjournment - First Contract Arbitration - *Hospital Labour Disputes Arbitration Act* - Practice and Procedure - Subsequent to union's application for direction of first contract by arbitration, union applying under *HLDA* for arbitration of dispute - Employer taking position that it is not a "hospital" within meaning of *HLDA* - Minister of Labour, as of date of Board proceeding, not having determined whether or not employer a "hospital" - Board rejecting argument that union's application under *HLDA* warranting dismissal of first contract application for abuse of process - Board adjourning first contract application pending Minister's decision
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- Adjournment - First Contract Arbitration - Practice and Procedure - Employer seeking adjournment on grounds that its counsel had been its spokesperson in negotiations and anticipated being in position of both witness and counsel at the Board hearing - Adjournment request denied - Board finding that employer's positions on monetary issues, its attempts to limit opportunity for arbitral review of employer decisions and to undermine just cause protection and recognition of seniority representing underlying refusal to recognize union's bargaining authority - Various employer proposals, including two-tier wage proposal taken without reasonable justification - Employer failing to make reasonable or expeditious efforts to conclude collective agreement - Board directing first contract arbitration
 BOYS' HOME, THE; RE C.U.P.E. AND ITS LOCAL 3501(Apr.) 409
- Adjournment - Health and Safety - Practice and Procedure - Complainant's counsel writing to Board on the day before hearing seeking adjournment on the ground that he was not ready to proceed - Neither complainant nor his counsel appearing at hearing - Board not satisfied that adjournment justified for several reasons, including fact that request not made in a timely manner - Complaint dismissed
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- Adjournment - Practice and Procedure - Sale of a Business - Stay - Unfair Labour Practice - Whether order issued by Quebec Superior Court under the *Companies' Creditors Arrangement Act* (C.C.A.A.) staying proceedings before the Board - Board determining that order staying proceeding against first respondent - Second respondent not entitled to relief under C.C.A.A., but Board viewing it as impossible to disentangle proceedings to permit matter

to continue against second respondent and to be stayed against first respondent - Complainant given option to await expiration of stay order, to obtain modification of the stay or to withdraw complaint and claim for relief against first respondent

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS LOCAL UNION NO. 419 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE R.W.S.D.U., AFL CIO CLC, AND ITS LOCAL 414 (July)

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Adjournment - Practice and Procedure - Unfair Labour Practice - Union counsel requesting adjournment because he had only been retained the day before - In the circumstances, Board not satisfied that last-minute change of counsel warranting adjournment - Board concluding that neither employer's decision to change grievor's shift, nor its provision of written instructions to grievor improperly motivated - Complaint dismissed

CYBERMEDIX HEALTH SERVICES LIMITED; RE O.P.S.E.U. (Mar.)

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Adjournment - Representation Vote - Termination - Following officer meeting and agreement to conduct vote on certain date, employer seeking adjournment of vote on ground that particular employee would be absent for medical reasons on the day of the vote - As alternative, employer requesting that employee be permitted to vote by proxy or to submit mail ballot or to cast ballot on return to work - Board denying employer requests - Representation vote resulting in tie - Board denying employer's renewed request that employee who missed vote be allowed to cast ballot - Board noting that parties had full opportunity for input into details of vote arrangements in advance of vote - Board explaining concerns surrounding proxy or mail balloting - Application dismissed

PEACOCK LUMBER LTD.; RE KENNETH W. LYON; RE R.W.D.S.U. AFL:CIO:CLC (Oct.)

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ing judicial review - Stay application dismissed by Divisional Court for failing to establish strong *prima facie* case

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ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894 (Feb.) 147

Bargaining Rights - Abandonment - Certification - Crown Transfer - Whether engaging subcontractor to provide on-site food services amounting to transfer of "undertaking" within meaning of *Crown Transfer Act* - Whether certification applications made by UFCW to represent employees of contractor barred - Whether certification application and application under *Crown Transfer Act* made by OPSEU defeated or barred by subsisting collective agreement between subcontractor and RWDSU - Board finding "transfer" of "part" of Crown's undertaking to subcontractor, but deciding that bargaining rights abandoned by OPSEU - Collective agreement between RWDSU and subcontractor operating as bar to OPSEU certification application - Certification applications made by UFCW granted - Certification application and crown transfer application made by OPSEU dismissed

PARNELL FOODS LIMITED ("PARNELL"); RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION ("UFCW"); RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION ("O.P.S.E.U.") (Dec.) 1164

Bargaining Rights - Abandonment - Construction Industry - Construction Industry Grievance - Employer - Board determining that Carpenters' union had not abandoned its bargaining rights in the ICI sector prior to March 1978 - Board adopting and applying *Metro Toronto #2* case and rejecting argument that respondent was acting in capacity of owner and purchaser of construction services and not as employer in the construction industry

SHELL CANADA LIMITED; RE C.J.A., LOCAL 1988 (Nov.) 1231

Bargaining Rights - Abandonment - Construction Industry - Construction Industry Grievance - Employer submitting that grievance ought to be dismissed for reasons of delay, prejudice suffered as a result of such delay and that doctrine of laches applying - Employer also submitting that union's bargaining rights abandoned - Employer not suffering the prejudice asserted and Board finding no abandonment - Board finding union estopped from asserting its rights pursuant to ICI agreement, but not determining length of estoppel - Grievance dismissed

STEDS LIMITED; RE L.I.U.N.A., LOCAL 493 (Jan.) 67

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BANCLIFFE CONTRACTING & CONSTRUCTION, 203733 ONTARIO INC. (FORMERLY KNOWN AS BANCLIFFE CONTRACTING & CONSTRUCTION LIMITED) NOW OPERATING AS BANCLIFFE INTERIORS, SHELDON ASSOCIATES LTD. OPERATING AS; RE C.J.A., LOCAL 27 (Sept.)

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ELLIS-DON LIMITED; RE I.B.E.W. LOCAL 105 (Sept.)

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TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES (Jan.)

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MIL-DOM-EX PACKAGING; RE O.P.S.E.U.; RE THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE CENTENNIAL CENTRE OF SCIENCE AND TECHNOLOGY (ONTARIO SCIENCE CENTRE) (Dec.)

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Bargaining Unit - Bargaining Rights - Certification - Construction Industry - Natural Justice - Reconsideration - Employer submitting that Board's decision in *O.J. Pipelines* incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed

TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES (Jan.)

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Bargaining Unit - Build-Up - Certification - Whether seasonal employees should be excluded from bargaining unit - Employer engaged in buying, processing and storing of leaf tobacco, not tobacco harvesting - While not at season's height of activity, October certification appli-

cation was made in season - Board determining that seasonal employees and permanent employees together represent a group of employees who can, on a viable basis, bargain collectively without creating serious labour relations problems for the employer - Issue of application of any build-up principle going to representation, not to bargaining unit configuration - Seasonal employees included in unit

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Bargaining Unit - Certification - Board reviewing and applying *Mississauga Hospital* case - Union's proposed bargaining unit, comprised solely of those employed as Registered and Graduate Nursing Assistants, found to be appropriate for the purpose of section 6(1) of the *Act* - Certificate issuing

SOUTH MUSKOKA MEMORIAL HOSPITAL; RE PRACTICAL NURSES FEDERATION OF ONTARIO (Apr.) 520

Bargaining Unit - Certification - Board reviewing and distinguishing *Mississauga Hospital* and *South Muskoka Memorial Hospital* cases - Board finding union's proposed bargaining unit, composed solely of those employed as Registered or Graduate Registered Nursing Assistants, not appropriate - Application dismissed

STRATHROY MIDDLESEX GENERAL HOSPITAL; RE PRACTICAL NURSES FEDERATION OF ONTARIO (Oct.) 1103

Bargaining Unit - Certification - Construction Industry - Pre-Hearing Vote - Parties disputing whether intervenor having valid collective agreement with employer - Applicant asking that, in addition to standard question on displacement application, ballot contain standard question on certification application - Board noting that it would be confusing and inappropriate to attempt to "cover all the bases" in vote by asking series of questions - Board concluding that given appearance of displacement application, usual question on displacement application, and only that question, to be asked on ballot

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POLYTARP PRODUCTS, ALROS PRODUCTS LIMITED C.O.B. AS; RE U.S.W.A..... (Apr.) 502

Bargaining Unit - Certification - Evidence - Membership Evidence - Petition - Objecting employees delivering petition to Office of Official Examiner in Ottawa - Petition not filed with Board prior to terminal date - Board declining to extend terminal date - Board accepting photocopied membership evidence where originals lost through no fault of union - Bargaining rights restricted to employer's Airline Services Division - Certificate issuing

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Bargaining Unit - Certification - Parties - Reconsideration - Employer submitting that panel placed undue emphasis on the need to facilitate access to collective bargaining and that it

would have framed reply differently had it known that the Board proposed to undertake a review of its jurisprudence - Board noting that employer aware from the outset that the union had placed the bargaining unit issue before the Board - Access to collective bargaining one of several relevant factors considered by the Board - SEIU submitting that it was denied opportunity to participate in the proceeding in that it did not have notice from the Board - Board finding that SEIU had indicated no basis on which it could properly seek standing from the Board to intervene - Reconsideration application dismissed

MISSISSAUGA HOSPITAL, THE; RE PRACTICAL NURSES FEDERATION OF ONTARIO; RE U.S.W.A. (Feb.)

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Bargaining Unit - Certification - Union making separate applications for full-time and part-time employees - Employer seeking to include and union seeking to exclude office and sales staff from proposed units - Board accepting union's position regarding exclusion of office and sales staff, but not accepting in totality its position concerning the scope of that exclusion - Board declining to depart from usual "4/7" test concerning how part-time or full-time status of employees should be determined

PRICE CLUB WESTMINSTER, PRICE CLUB ST. LAURENT INC. C.O.B. AS; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES..... (Oct.)

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Bargaining Unit - Certification - Union seeking "all-employee" bargaining unit - Employer and objecting employees taking position that "office and clerical staff" should be treated as separate bargaining unit - Board applying *Hospital For Sick Children* test - Board finding that employees in unit sought sharing sufficiently coherent community of interest that they should be able to bargain together on a viable basis - Board determining that "all-employee" unit appropriate

MOTOR COACH INDUSTRIES LIMITED C.O.B. AS M.C.I. SERVICE PARTS COMPANY; RE C.B.R.T. & G.W.; RE GROUP OF EMPLOYEES (June)

744

Bargaining Unit - Certification - Union seeking bargaining unit of company's drivers in the 2 Sudbury districts of its Northern Ontario region - Company submitting that only appropriate unit would include all its drivers in the Northern Ontario Region - Although union's proposed unit unusual, problems raised by company not so serious as to create an obstacle to an otherwise appropriate bargaining unit - Board finding evidence insufficient to endorse unprecedented Northern regional basis advanced by company as only appropriate bargaining unit - Board finding union's proposed unit appropriate - Certificate issuing

HOSTESS FRITO LAY CO., THE; RE MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION NO. 647 AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE GROUP OF EMPLOYEES..... (July)

809

Bargaining Unit - Certification - Union seeking bargaining unit of full-time employees - Employer taking position that full-time and part-time employees should be in the same unit - Board observing that since *Hospital for Sick Children* case, Board focusing on applicant's bargaining unit, in the absence of serious labour relations problems to the employer - Board finding full-time bargaining unit appropriate

SIMCOE COUNTY ASSOCIATION FOR THE PHYSICALLY DISABLED; RE C.U.O.E. (July)

857

Bargaining Unit - Certification - Whether "ward clerks" should be included in service bargaining unit - Board rejecting employer submission that ward clerks' union membership evidence should be examined to determine the issue - Board ruling that where a union applies for certification for a unit that is appropriate, it is entitled to that unit even though there is a

plausible alternative description which would also be appropriate - Bargaining unit sought by union including "ward clerks" found to be appropriate

HOMEWOOD HEALTH CENTRE, THE HOMEWOOD SANITARIUM OF GUELPH
ONTARIO LIMITED C.O.B. AS; RE U.F.C.W., C.L.C., A.F.L., C.I.O.; RE GROUP
OF EMPLOYEES..... (Feb.) 181

Bargaining Unit - Construction Industry - Termination - Applicant and supporting employees not members of the union and not hired through the hiring hall - Whether employees bringing the termination application entitled to support and bring the application - Board regarding reasoning in *April Waterproofing* decision applicable - Application dismissed

KEN ACTON PLUMBING & HEATING INC.; RE PAUL MCCONACHIE AND U.A.,
LOCAL 27..... (May) 604

Bargaining Unit - Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Voluntary Recognition - Employer seeking recognition clause different from one found in voluntary recognition agreement - Board finding that parties had bargained to impasse and that employer's insistence on pressing its position on bargaining unit constituting bargaining in bad faith - Board making cease and desist direction, but declining to order payment of damages

WELLINGTON COUNTY SEPARATE SCHOOL BOARD, THE; RE WELLINGTON
SEPARATE SUPPORT STAFF ASSOCIATION (Oct.) 1128

Build-Up - Bargaining Unit - Certification - Whether seasonal employees should be excluded from bargaining unit - Employer engaged in buying, processing and storing of leaf tobacco, not tobacco harvesting - While not at season's height of activity, October certification application was made in season - Board determining that seasonal employees and permanent employees together represent a group of employees who can, on a viable basis, bargain collectively without creating serious labour relations problems for the employer - Issue of application of any build-up principle going to representation, not to bargaining unit configuration - Seasonal employees included in unit

R.J.R. MACDONALD INC.; RE BAKERY CONFECTIONERY & TOBACCO
WORKERS INTERNATIONAL UNION AFL CIO CLC; RE GROUP OF
EMPLOYEES..... (Feb.) 195

Certification - Abandonment - Bargaining Rights - Crown Transfer - Whether engaging subcontractor to provide on-site food services amounting to transfer of "undertaking" within meaning of *Crown Transfer Act* - Whether certification applications made by UFCW to represent employees of contractor barred - Whether certification application and application under *Crown Transfer Act* made by OPSEU defeated or barred by subsisting collective agreement between subcontractor and RWDSU - Board finding "transfer" of "part" of Crown's undertaking to subcontractor, but deciding that bargaining rights abandoned by OPSEU - Collective agreement between RWDSU and subcontractor operating as bar to OPSEU certification application - Certification applications made by UFCW granted - Certification application and crown transfer application made by OPSEU dismissed

PARNELL FOODS LIMITED ("PARNELL"); RE UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION ("UFCW"); RE ONTARIO PUBLIC
SERVICE EMPLOYEES UNION ("O.P.S.E.U.") (Dec.) 1164

Certification - Abandonment - Representation Vote - Union making displacement application - Incumbent union notifying Board that it wishes to abandon bargaining rights - Representation vote not required in circumstances - Certificate issuing

CARA OPERATIONS LIMITED; RE CANADIAN UNION OF RESTAURANT AND
RELATED EMPLOYEES (Feb.) 130

- Certification - Adjournment - Construction Industry - Construction Industry Grievance - Evidence - Practice and Procedure - Related Employer - Board permitting employer to use tape-recorder but not hand-held video camera to record proceedings - Board denying request for adjournment so that ruling on video camera might be appealed - Board directing all parties to set out all facts and to list and produce all documents upon which they intend to rely prior to next hearing date - Board commenting on standards of decorum to which parties appearing before the Board must adhere
- BEMAR CONSTRUCTION (ONTARIO) INC.; RE I.B.E.W., LOCAL 353 (May) 565
- Certification - Adjournment - Construction Industry - Parties - Practice and Procedure - Given wording of union's proposed bargaining unit description, Board declining adjournment request to give notice to Canadian Pipe Fabricators Association and to Plumbers' union - Board declining to defer certification application pending determination of two section 126 referrals of grievances to arbitration - Board denying requested adjournment and extension of terminal date because of intervener's certification application - Board ruling that its practice in dealing with intervener applications filed on or before "original" certification application's terminal date is to have that intervener application governed by "original" application's application and terminal dates
- E.S. FOX LIMITED; RE SHOPMEN'S LOCAL 834 OF THE B.S.O.I.W.; RE C.J.A. ON BEHALF OF LOCALS 1007, 1151, 1244, 1410, 1425, 1592, 1916 AND 2309; RE U.A., LOCAL UNION 666; RE I.B.E.W., LOCAL 303; RE I.U.O.E., LOCAL 793 (June) 693
- Certification - Bargaining Rights - Bargaining Unit - Construction Industry - Natural Justice - Reconsideration - Employer submitting that Board's decision in *O.J. Pipelines* incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed
- TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES (Jan.) 90
- Certification - Bargaining Unit - Board reviewing and applying *Mississauga Hospital* case - Union's proposed bargaining unit, comprised solely of those employed as Registered and Graduate Nursing Assistants, found to be appropriate for the purpose of section 6(1) of the *Act* - Certificate issuing
- SOUTH MUSKOKA MEMORIAL HOSPITAL; RE PRACTICAL NURSES FEDERATION OF ONTARIO (Apr.) 520
- Certification - Bargaining Unit - Board reviewing and distinguishing *Mississauga Hospital* and *South Muskoka Memorial Hospital* cases - Board finding union's proposed bargaining unit, composed solely of those employed as Registered or Graduate Registered Nursing Assistants, not appropriate - Application dismissed
- STRATHROY MIDDLESEX GENERAL HOSPITAL; RE PRACTICAL NURSES FEDERATION OF ONTARIO (Oct.) 1103
- Certification - Bargaining Unit - Build-Up - Whether seasonal employees should be excluded from bargaining unit - Employer engaged in buying, processing and storing of leaf tobacco, not tobacco harvesting - While not at season's height of activity, October certification application was made in season - Board determining that seasonal employees and permanent employees together represent a group of employees who can, on a viable basis, bargain collectively without creating serious labour relations problems for the employer - Issue of

application of any build-up principle going to representation, not to bargaining unit configuration - Seasonal employees included in unit

R.J.R. MACDONALD INC.; RE BAKERY CONFECTIONERY & TOBACCO WORKERS INTERNATIONAL UNION AFL CIO CLC; RE GROUP OF EMPLOYEES..... (Feb.) 195

Certification - Bargaining Unit - Construction Industry - Pre-Hearing Vote - Parties disputing whether intervenor having valid collective agreement with employer - Applicant asking that, in addition to standard question on displacement application, ballot contain standard question on certification application - Board noting that it would be confusing and inappropriate to attempt to "cover all the bases" in vote by asking series of questions - Board concluding that given appearance of displacement application, usual question on displacement application, and only that question, to be asked on ballot

ABS MASONRY, 419990 ONTARIO LTD. C.O.B. AS; RE B.A.C., LOCAL 2 AND B.M.I.U., LOCAL 1..... (May) 535

Certification - Bargaining Unit - Employee - Pre-Hearing Vote - Employer taking position in reply to union's certification application that bargaining unit should include second location within municipality - Union claiming that employees not sharing community of interest - Union also seeking to reserve its right, pending further investigation following pre-hearing vote, to challenge managerial or employee status of employees at second location - Absent appropriate challenges being made up to and including the time of the actual taking of the vote, Board seeing no basis for directing segregation of all ballots - Board finding no basis for allowing union to reserve any right to make challenges following the taking of the vote

POLYTARP PRODUCTS, ALROS PRODUCTS LIMITED C.O.B. AS; RE U.S.W.A..... (Apr.) 502

Certification - Bargaining Unit - Evidence - Membership Evidence - Petition - Objecting employees delivering petition to Office of Official Examiner in Ottawa - Petition not filed with Board prior to terminal date - Board declining to extend terminal date - Board accepting photocopied membership evidence where originals lost through no fault of union - Bargaining rights restricted to employer's Airline Services Division - Certificate issuing

CARA OPERATIONS LIMITED; RE HOTEL, CLUBS, RESTAURANTS, TAVERNS EMPLOYEES UNION, LOCAL 261; RE GROUP OF EMPLOYEES..... (Feb.) 131

Certification - Bargaining Unit - Parties - Reconsideration - Employer submitting that panel placed undue emphasis on the need to facilitate access to collective bargaining and that it would have framed reply differently had it known that the Board proposed to undertake a review of its jurisprudence - Board noting that employer aware from the outset that the union had placed the bargaining unit issue before the Board - Access to collective bargaining one of several relevant factors considered by the Board - SEIU submitting that it was denied opportunity to participate in the proceeding in that it did not have notice from the Board - Board finding that SEIU had indicated no basis on which it could properly seek standing from the Board to intervene - Reconsideration application dismissed

MISSISSAUGA HOSPITAL, THE; RE PRACTICAL NURSES FEDERATION OF ONTARIO; RE U.S.W.A. (Feb.) 191

Certification - Bargaining Unit - Union making separate applications for full-time and part-time employees - Employer seeking to include and union seeking to exclude office and sales staff from proposed units - Board accepting union's position regarding exclusion of office and sales staff, but not accepting in totality its position concerning the scope of that exclusion -

Board declining to depart from usual "4/7" test concerning how part-time or full-time status of employees should be determined

PRICE CLUB WESTMINSTER, PRICE CLUB ST. LAURENT INC. C.O.B. AS; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES..... (Oct.)

1098

Certification - Bargaining Unit - Union seeking "all-employee" bargaining unit - Employer and objecting employees taking position that "office and clerical staff" should be treated as separate bargaining unit - Board applying *Hospital For Sick Children* test - Board finding that employees in unit sought sharing sufficiently coherent community of interest that they should be able to bargain together on a viable basis - Board determining that "all-employee" unit appropriate

MOTOR COACH INDUSTRIES LIMITED C.O.B. AS M.C.I. SERVICE PARTS COMPANY; RE C.B.R.T. & G.W.; RE GROUP OF EMPLOYEES (June)

744

Certification - Bargaining Unit - Union seeking bargaining unit of company's drivers in the 2 Sudbury districts of its Northern Ontario region - Company submitting that only appropriate unit would include all its drivers in the Northern Ontario Region - Although union's proposed unit unusual, problems raised by company not so serious as to create an obstacle to an otherwise appropriate bargaining unit - Board finding evidence insufficient to endorse unprecedented Northern regional basis advanced by company as only appropriate bargaining unit - Board finding union's proposed unit appropriate - Certificate issuing

HOSTESS FRITO LAY CO., THE; RE MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION NO. 647 AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE GROUP OF EMPLOYEES..... (July)

809

Certification - Bargaining Unit - Union seeking bargaining unit of full-time employees - Employer taking position that full-time and part-time employees should be in the same unit - Board observing that since *Hospital for Sick Children* case, Board focusing on applicant's bargaining unit, in the absence of serious labour relations problems to the employer - Board finding full-time bargaining unit appropriate

SIMCOE COUNTY ASSOCIATION FOR THE PHYSICALLY DISABLED; RE C.U.O.E. (July)

857

Certification - Bargaining Unit - Whether "ward clerks" should be included in service bargaining unit - Board rejecting employer submission that ward clerks' union membership evidence should be examined to determine the issue - Board ruling that where a union applies for certification for a unit that is appropriate, it is entitled to that unit even though there is a plausible alternative description which would also be appropriate - Bargaining unit sought by union including "ward clerks" found to be appropriate

HOMEWOOD HEALTH CENTRE, THE HOMEWOOD SANITARIUM OF GUELPH ONTARIO LIMITED C.O.B. AS; RE U.F.C.W., C.L.C., A.F.L., C.I.O.; RE GROUP OF EMPLOYEES..... (Feb.)

181

Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Unfair Labour Practice - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing

WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105 (Jan.)

101

Certification - Certification Where Act Contravened - Construction Industry - Employee - Employer - Dependent Contractor - Discharge - Unfair Labour Practice - Electrical sub-

contractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing

GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687 (July) 800

Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Unfair Labour Practice - Remedies - Discharges not motivated solely by legitimate business reasons - Reinstatement appropriate even where there is successor employer - Board issuing certificate pursuant to section 8 of the *Act*

BEAVER LUMBER, WENTWORTH BEAVER LIMITED C.O.B. AS; RE R.W.D.S.U., AFL:CIO:CLC (May) 553

Certification - Certification Where Act Contravened - Discharge - Practice and Procedure - Unfair Labour Practice - Failure to secure employees' written authorization not precluding union from claiming relief on behalf of those employees - Board finding employee's suspension, certain demotions and lay-offs motivated by anti-union animus - Employer harassment and warning letter directing in-plant organizer to cease collecting cards on company property, in circumstances, violating the Act - Various employer statements at employee meetings also violating the Act - Board issuing certificate pursuant to section 8 of the *Act*

ROYAL HOMES LIMITED; RE C.J.A., LOCAL 27; RE GROUP OF EMPLOYEES; RE C.J.A., LOCAL 3054..... (Feb.) 199

Certification - Certification Where Act Contravened - Unfair Labour Practice - Certification hearing held in June, union's unfair labour practice complaint made in July, and request for relief under section 8 of the Act made in August - Allegations supporting request under section 8 alleged to have occurred prior to June - Board deciding that union's delay disentiitling it from relying on section 8 of the *Act* in support of certification application

AMORIM ENTERPRISES LTD.; RE H.E.R.E., LOCAL 75; RE GROUP OF EMPLOYEES (Feb.) 123

Certification - Change in Working Conditions - Collective Agreement - Construction Industry - Employer Support - Timeliness - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the *Act* - Certification application dismissed as being untimely

STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C. (Sept.) 1049

Certification - Charges - Construction Industry - Reconsideration - Employee making "non-pay" allegation and seeking revocation of certificate - Facts pleaded not disclosing "non-pay" - Board reviewing and applying *Calvano Lumber* case in respect of "loan" issue and effect on Form 80 declaration - Reconsideration application dismissed

KEN ACTON PLUMBING & HEATING INC.; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES (Feb.) 187

Certification - Charges - Evidence - Membership Evidence - Witness - Witness in non-pay inquiry testifying that she paid \$1 when applying for union membership - Witness acknowledging in cross-examination that she had made previous inconsistent statements - Board declining to accept witness' prior inconsistent statements as evidence of the truth of their contents -

- Board having no affirmative evidence that witness did not pay a dollar in regard to her application - Non-pay allegation dismissed
- CAMARO ENTERPRISES LIMITED; RE IUOE, LOCAL 793; RE GROUP OF EMPLOYEES.....(July) 772
- Certification - Charges - Evidence - Representation Vote - Four employees who had not been on voters' list casting ballots - Employees arguing that they properly belong in bargaining unit and that their ballots should be counted -Board ruling that their segregated ballots not be counted and that it would not inquire further into their duties and responsibilities - Board permitting union to call evidence of handwriting expert as part of defence to forgery allegation in non-pay/non-sign inquiry - Board determining that card submitted by union reliable - Board commenting on procedure where non-pay/non-sign allegations raised subsequent to representation vote - Certificate issuing
- MOORE CORPORATION LIMITED; RE GRAPHIC COMMUNICATION INTERNATIONAL UNION, LOCAL N-1; RE GROUP OF EMPLOYEES..... (May) 614
- Certification - Charges - Petition - Intimidation and Coercion - Board finding reaffirmation document submitted by union representing voluntary wishes of those signing it - Objectors' charges of union misconduct not established on the evidence - Board declining to draw inference of intimidation from fact that employees of Vietnamese origin overwhelmingly supported union and resisted objectors' efforts to persuade them to contrary view - Certificate issuing
- RIVERSIDE FABRICATING LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES.....(Aug.) 958
- Certification - Charges - Practice and Procedure - Inquiry into non-pay allegation disclosing loan by fellow employee and repayment - Board seeing no reason to direct hearing into allegation - Board to dispose of certification application without further notice unless it receives submissions from any party showing why the Board should hold a hearing into the allegation
- BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE U.P.G.W.A. (Jan.) 15
- Certification - Collective Agreement - Timeliness - Whether collective agreement in effect between incumbent union and employer and, consequently, operating to bar instant certification application - Board not satisfied either that bargaining had come to a complete end, or that all of the precise terms of the collective agreement asserted by incumbent union can be ascertained - Union's objection with respect to collective agreement bar dismissed and Board directing that representation vote be taken
- MULLER'S MEATS LIMITED; RE MULLER'S MEATS EMPLOYEES ASSOCIATION; RE R.W.D.S.U. AFL:CIO:CLC(Aug.) 942
- Certification - Constitutional Law - Construction Industry - Employer in business of installing, testing, maintaining and servicing antennae for cellular phone systems - Board concluding that employer's operations integrally related to federal works or undertakings and subject to federal jurisdiction in matters of labour relations
- CANADIAN COMMUNICATIONS STRUCTURES INC.; RE IRONWORKERS DISTRICT COUNCIL(July) 777
- Certification - Construction Industry - Board dismissing union's certification application in accordance with Practice Note #7, but declining employer's request to impose 6 month bar on future applications for certification
- BELAIR RESTORATION (ONTARIO) INC., BELAIR RESTORATION (OTTAWA); RE O.P.C.M., LOCAL UNION 172 RESTORATION STEEPLEJACKS(Jan.) 13

- Certification - Construction Industry - Dependent Contractor - Employer - Whether certain individuals or entities properly characterized as 'employees' or 'dependent contractors', or as 'independent contractors' - Board finding certain entities not dependent on respondent employer and therefore 'independent contractors' - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the *Act* - Certificates issuing
- ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.;
RE CARPENTERS & ALLIED WORKERS LOCAL 27, C.J.A.....(Aug.) 891
- Certification - Construction Industry - Employee - Evidence - Practice and Procedure - Board satisfied that certain documents properly admitted as exhibits by Officer conducting examination in the exercise of his discretion - *E. & E. Seegmiller* case explained - Onus of proof regarding employee list issues lying with party seeking to exclude the person whose status is in question, except where it would have to prove a negative in order to succeed
- CAMARO ENTERPRISES LIMITED C.O.B. AS MULДАР CONSTRUCTION AND
C.O.B. AS PARK TRUCKING, WALTER AMBROZIK, ERWIN MOWATSKI, ANNE
MOWATSKI; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES.....(Apr.) 423
- Certification - Construction Industry - Employee on training course held not "at work" in the unit for purposes of the count - Board rejecting argument that four employees at work in proposed bargaining unit on the application date should be included on list of employees even though they were not qualified pursuant to *Trades Act* to work in the electrician trade - Board holding that even if lawfully employed, the four employees would share no real community of interest with the journeymen and apprentice electricians
- SITECO ELECTRIC LTD. AND LEO ALARIE AND SONS LIMITED; RE I.B.E.W.;
RE I.U.O.E., LOCAL 793.....(Mar.) 383
- Certification - Construction Industry - Employer - Evidence - Practice and Procedure - Unfair Labour Practice - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing - Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date
- GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN
BAND; RE L.I.U.N.A., LOCAL 607 (Feb.) 174
- Certification - Construction Industry - Petition - Petitioner's own characterization of his position to employees he solicited, and the freedom with which he moved about and interrupted employees' work in making those solicitations, in the presence of actual members of management, satisfying Board that the employee perspective would likely have been to link the petitioning activities to the employer - Board according no weight to petition - Certificate issuing
- CAMARO ENTERPRISES LIMITED; RE I.U.O.E. LOCAL 793; RE GROUP OF
EMPLOYEES.....(Aug.) 901
- Certification - Construction Industry - Petition - Practice and Procedure - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board concluding that petition involuntary viewing petitioners' evidence in the best light, from the petitioners' perspective - Certificate issuing
- HURLEY CORPORATION; RE LABOURERS' INTERNATIONAL UNION OF
NORTH AMERICA; RE GROUP OF EMPLOYEES (May) 582

- Certification - Construction Industry - Petition - Practice and Procedure - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board observing that fairness and natural justice not demanding that moving party make election whether or not to call evidence in every case - No party asking that union be put to its election in this case and Board exercising its discretion not to require union to elect
HURLEY CORPORATION; RE L.I.U.N.A.; RE GROUP OF EMPLOYEES(Aug.) 940
- Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Practice and Procedure - Board reconsidering its customary practice with respect to voter eligibility in construction industry certification applications and concluding that dual voter eligibility dates not appropriate - Board determining that in construction industry certification applications, those eligible to vote will be those at work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date
CRETE FLOORING GROUP LIMITED; RE L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 (July) 792
- Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Reconsideration - Unfair Labour Practice - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in *Crete Flooring* case - Nothing in *Crete Flooring* suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed
METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 (Sept.) 1007
- Certification - Construction Industry - Related Employer - Remedies - Board finding developer, owner and contractor to be separate entities under common control and direction engaged in related activity - Board exercising discretion to grant single employer declaration limited to agreed to bargaining unit - Certificates issuing
ITALIAN CANADIAN BENEVOLENT CORPORATION (TORONTO DISTRICT); RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A. (Oct.) 1074
- Certification - Construction Industry - Union applying for certification in spring of 1991 and Board conducting pre-hearing vote - Application dismissed after ballots counted in April 1992 - Union filing second application in February 1992 - Whether Board should impose bar on second application - Having regard to competing interests and nature of employment in construction industry, Board satisfied that it would not be appropriate to refuse to entertain second application
STEPHENS AND RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C. (June) 762
- Certification - Dependent Contractor - Board finding drivers working under roof sign of various taxicab brokers to be "dependant contractors"
DIAMOND TAXICAB ASSOCIATION (TORONTO) LIMITED; RE R.W.D.S.U., AFL:CIO:CLC(Nov.) 1143
- Certification - Discharge - Discharge for Union Activity - Membership Evidence - Petition - Unfair Labour Practice - Board not satisfied that employer's reasons for employee's lay-off entirely free of improper motivation - Board not satisfied that petitions representing voluntary expressions of employee wishes - Board re-affirming that it does not treat revocation, resignation or withdrawal of membership as cancelling or invalidating membership card for

purposes of Board's assessment under section 7 of the Act - Allegation that union refused to return petitioner's card, even if true, not creating defect in the membership evidence - Certificate issuing

HAVLIK TECHNOLOGIES INC., (WILLIAMS MACHINES DIVISION); RE C.A.W.;
RE GROUP OF EMPLOYEES (Apr.) 468

Certification - Employer - Related Employer - First respondent operating theatre complex under agreement with complex owner - Other respondents, amongst others, using complex under licence for producing or presenting theatrical productions - Respondents under common control or direction - Respondents asserting that they carry on businesses separately but in a related enterprise - Common employer declaration issuing - Board, however, finding the "producer" rather than "the house" to be the employer of the stagehands dispatched from the union's hiring hall - Board determining that for purposes of "the count" in this industry, the employee complement is that which exists on the application date - As there were no employees of the named respondents at work in the bargaining unit at the time the application was made, certification application dismissed

THEATRECOP LTD., AND WGC FACILITY MANAGEMENT CORPORATION
AND THEATREMART LTD.; RE I.A.T.S.E., LOCAL 58, TORONTO..... (Mar.) 388

Certification - Employer Support - Trade Union Status - Board satisfied that employer participated in formation and administration of applicant union and contributed support to it - Section 13 of the *Act* operating to bar certification - Certification application dismissed

AIRLIFT LIMOUSINE SERVICES LIMITED; RE THE CANADIAN ALLIANCE OF
AIRPORT TRANSPORTATION WORKERS; RE TEAMSTERS' UNION, LOCAL
UNION 938 (Sept.) 985

Certification - *Hospital Labour Disputes Arbitration Act* - Interest Arbitration - Pre-Hearing Vote - Timeliness - Interest arbitration award on 'central issues' issued in December 1991 - Award establishing term of collective agreement to be from April 1, 1990 to March 31, 1992 - Rival union making displacement certification application in February 1992 - "Local issues" arbitration award still outstanding and collective agreement for 1990-92 period not yet made - Board finding displacement application timely under HLDAA as falling within 60 days preceding March 31, 1992 or, alternatively, within 90 days after "central issues" award - Board directing that ballots cast in pre-hearing vote be counted

CHATEAU GARDENS QUEENS, MERCEDES CORPORATION C.O.B. AS; RE
C.L.A.C.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL
220 (Aug.) 906

Certification - Parties - Practice and Procedure - Following termination of CPU's bargaining rights, rival union making certification application - CPU not receiving notice of application from Board - Board determining that CPU not entitled to notice and not establishing that it represents any employee in the bargaining unit - Board dismissing CPU's application to intervene or participate in certification application

DOMTAR INC.; RE INDEPENDENT PAPERWORKERS OF CANADA..... (Nov.) 1184

Certification - Parties - Practice and Procedure - Unfair Labour Practice - Carpenters' union applying for certification and filing unfair labour practice complaint - Labourers' union seeking to intervene on ground that remedy sought under complaint would have effect of displacing member of Labourers - Labourers also submitting that Board finding might affect outcome of grievance earlier filed by Labourers - Labourers' interest contingent on various factors - Board denying Labourers standing on adjudication of merits of complaint - Labourers, however, to be given notice of any subsequent hearing to deal with remedy and to have opportunity to show why they should be granted standing for that hearing

AROSAN ENTERPRISES LIMITED; RE C.J.A., LOCAL 93..... (Jan.) 10

- Certification - Petition - Unfair Labour Practice - Complaint in respect of certain lay-offs, letters from the company to the employees and incident regarding employee wearing union pin allowed - Complaint in all other respects dismissed - Petition held not a reliable indication of voluntary change of heart - Certificate issuing
THERMOGENICS INC.; RE B.B.F.; RE GROUP OF EMPLOYEES (Feb.) 224
- Certification - Practice and Procedure - Reconsideration - Board hearing certification application and two unfair labour practice complaints together - Board ruling that it would first hear evidence concerning challenges to the list and issue a decision on those challenges before inquiring into voluntariness of petition and unfair labour practice complaints - Board deciding that three individuals should be included on the list and then beginning to hear evidence concerning the petition and complaints - Union seeking reconsideration on the ground that evidence elicited in relation to the unfair labour practice complaint contradicts findings of Board in its decision on the list - Board unwilling to reconsider its decision based on evidence which came out subsequent to that decision which was readily available and could have been called by the union, but was not - Request for reconsideration dismissed
GEORGIAN INDUSTRIES INC.; RE A.C.T.W.U.; RE GROUP OF EMPLOYEES (Apr.) 459
- Certification - Practice and Procedure - Trade Union Status - Employer not challenging trade union status and having no objection to Board relying on documents filed by applicant in respect of status issue - Board satisfied that applicant a trade union within meaning of the *Act* - Certificate issuing
CANADA SECURITY CORPORATION; RE CANADIAN SECURITY UNION (Feb.) 129
- Certification - Practice and Procedure - Unfair Labour Practice - Union seeking to withdraw certification application and unfair labour practice complaint - Employer urging that unfair labour practice complaint be dismissed "with prejudice" and that certification application be dismissed with endorsement reserving employer's right to argue that there should be a bar if the union filed a new application - Objectors asking Board to impose immediate six-month bar - Board considering rationale for imposing bar in certain cases and reviewing practical distinction between "withdrawal" and "dismissal" of Board proceedings - Certification application dismissed without bar - Complaint withdrawn
R.J.R. MACDONALD INC.; RE B.C.T. AFL-CIO-CLC; RE GROUP OF EMPLOYEES (Apr.) 503
- Certification - Pre-Hearing Vote - Timeliness - Respondent and intervener submitting that no pre-hearing vote ought to be directed because application untimely - Respondent and intervener signing new collective agreement following recent decision of the Board granting joint request for early termination of collective agreement - Applicant seeking reconsideration of Board's decision granting early termination - Board directing that pre-hearing representation vote be taken and that ballots be sealed until parties have been given full opportunity to present their evidence and make their submissions
LEDCOR INDUSTRIES LIMITED; RE L.I.U.N.A., LOCAL 183; RE C.L.A.C. . (Feb.) 190
- Certification - Pre-Hearing Vote - Union applying for certification by way of pre-hearing vote - Terminal date set for Friday and Officer's meeting scheduled for following Monday - No opportunity to involve Board Officer in any kind of "waiver process" - Union requesting copy of employee list to review in advance of meeting - Employer objecting - Board directing that employee list be circulated immediately
POLYTARP PRODUCTS, ALROS PRODUCTS LIMITED C.O.B. AS;
RE U.S.W.A. (Apr.) 498
- Certification - Pre-Hearing Vote - Union making certification application on April 7 and, after

reviewing employees lists, withdrawing application on May 6 - Union making subsequent pre-hearing certification applications for full-time and part-time employees on May 12 - After meeting with Labour Relations Officer and reviewing employee lists, union seeking to withdraw applications - Employer requesting that applications be dismissed, that six month bar on further applications be imposed, and that union's membership position in the applications be disclosed to employer - Board dismissing certification applications, but declining to impose bar or release union's membership count

CHIMO INNS, THE DOUGLAS MACDONALD DEVELOPMENT CORPORATION C.O.B.; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE GROUP OF EMPLOYEES..... (July)

786

Certification - Pre-Hearing Vote - Voluntary Recognition - Union advising Board that outstanding representational issues resolved on basis of executed and ratified voluntary recognition agreement - Union seeking leave to withdraw certification application - Individual employee asking Board to address issues raised earlier in proceeding - Application dismissed

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E. - C.L.C., ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE THE COALITION TO STOP CERTIFICATION OF THE SOCIETY ON BEHALF OF CERTAIN EMPLOYEES..... (Apr.)

495

Certification - Reconsideration - Employer seeking revocation of earlier certification decision on ground that it had not filed sample signatures as directed by the Board - Board weighing desirability of double-checking mechanism with necessity for expedition in certification matters - Board striking balance by requiring sample signatures, but where these are not filed in timely manner, deciding matter on evidence before it - Board declining to reconsider its certification decision

A & L CANADA LABORATORIES EAST, INC.; RE ENERGY AND CHEMICAL WORKERS UNION..... (Sept.)

983

Certification - Related Employer - Union seeking to represent building resident superintendents and asserting that 3 condominium corporations are related employers - Membership and board of directors of corporations entirely separate, but common property manager acting on behalf of the 3 corporations - Board finding employment activities of the superintendents inter-related and inter-dependent - "Common direction and control" residing in property manager extending to all day-to-day activities relating to purposes of the corporations - Board issuing related employer declaration - Certificate granted

METROPOLITAN TORONTO CONDOMINIUM CORPORATION #880; METROPOLITAN TORONTO CONDOMINIUM CORPORATION #897; METROPOLITAN TORONTO CONDOMINIUM CORPORATION #934; RE L.I.U.N.A., LOCAL 183 (Dec.)

1145

Certification - Representation Vote - Settlement - Unfair Labour Practice - Parties' settlement of certification application and related unfair labour practice complaint requiring Board to conduct representation vote - Board seeing no reason not to act on that agreement of the parties - Board directing representation vote

WEATHERSTRONG BUILDING PRODUCTS LTD.; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Jan.)

100

Certification - Trade Union - Employees not meeting eligibility requirements of union's constitu-

tion - Union not having established practice of admitting persons to membership without regard to eligibility requirements of constitution - Application dismissed

ST. CATHARINES HYDRO ELECTRIC COMMISSION; RE CAN WORKERS FEDERAL UNION, LOCAL 354, CANADIAN LABOUR CONGRESS;
RE I.B.E.W. (May) 638

Certification - Union requesting that it be provided with copy of employee list in advance of Officer meeting - Employer agreeing to union's request so long as it permitted to see union's Form 9 at the same time - Board reviewing history of employee list issue and describing development of Board's regional certification program and expanded "waiver" program - Board explaining how waiver Officer now typically provides union with copy of the list after parties' positions on bargaining unit description identified - Board concluding that expanded form of "waiver" process affording Board means of striking more complete balance with respect to parties' competing concerns, while serving broader interests of economy and efficiency for community at large

COR JESU RE-EDUCATION CENTRE OF TIMMINS INC., CENTRE DE RÉÉDUCATION COR JESU DE TIMMINS INC./; RE U.S.W.A. (Mar.) 298

Certification Where Act Contravened - Certification - Discharge - Discharge for Union Activity - Unfair Labour Practice - Remedies - Discharges not motivated solely by legitimate business reasons - Reinstatement appropriate even where there is successor employer - Board issuing certificate pursuant to section 8 of the *Act*

BEAVER LUMBER, WENTWORTH BEAVER LIMITED C.O.B. AS; RE R.W.D.S.U., AFL:CIO:CLC (May) 553

Certification Where Act Contravened - Certification - Construction Industry - Discharge - Discharge for Union Activity - Unfair Labour Practice - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing

WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105 (Jan.) 101

Certification Where Act Contravened - Certification - Construction Industry - Employee - Employer - Dependent Contractor - Discharge - Unfair Labour Practice - Electrical subcontractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing

GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687 (July) 800

Certification Where Act Contravened - Certification - Discharge - Practice and Procedure - Unfair Labour Practice - Failure to secure employees' written authorization not precluding union from claiming relief on behalf of those employees - Board finding employee's suspension, certain demotions and lay-offs motivated by anti-union animus - Employer harassment and warning letter directing in-plant organizer to cease collecting cards on company property, in circumstances, violating the Act - Various employer statements at employee meetings also violating the Act - Board issuing certificate pursuant to section 8 of the *Act*

ROYAL HOMES LIMITED; RE C.J.A., LOCAL 27; RE GROUP OF EMPLOYEES; RE C.J.A., LOCAL 3054..... (Feb.) 199

Certification Where Act Contravened - Certification - Unfair Labour Practice - Certification hearing held in June, union's unfair labour practice complaint made in July, and request for

relief under section 8 of the Act made in August - Allegations supporting request under section 8 alleged to have occurred prior to June - Board deciding that union's delay disintitling it from relying on section 8 of the Act in support of certification application

AMORIM ENTERPRISES LTD.; RE H.E.R.E., LOCAL 75; RE GROUP OF EMPLOYEES (Feb.) 123

Change in Working Condition - Unfair Labour Practice - Board finding that implementation of revised policy regarding sales commissions on returns and account corrections violating "statutory freeze" - Employer directed to compensate bargaining unit members for all losses

THE BRICK WAREHOUSE CORPORATION; RE R.W.D.S.U. AFL:CIO:CLC. (Oct.) 1118

Change in Working Conditions - Certification - Collective Agreement - Construction Industry - Employer Support - Timeliness - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the Act - Certification application dismissed as being untimely

STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C. (Sept.) 1049

Change in Working Conditions - *Hospital Labour Disputes Arbitration Act* - Unfair Labour Practice - Board determining that employer's failure to pay "interval" wage increases during 1990 and 1991 violating the statutory "freeze" - Union's delay in making complaint, in the circumstances, not standing in the way of a Board finding and remedial order - Complaint upheld - Employer directed to implement the wage increase for 1990 and 1991 according to its established practice

HARROWOOD SENIORS' COMMUNITY; RE C.U.P.E., LOCAL 3419..... (Feb.) 177

Change in Working Conditions - *Hospital Labour Disputes Arbitration Act* - Unfair Labour Practice - Board determining that, in the particular circumstances, employer's freezing of employees' anniversary increments not violating "statutory freeze"

ROYAL OTTAWA HEALTH CARE GROUPS/SERVICES DE SANTE ROYAL OTTAWA; RE O.P.S.E.U. (Nov.) 1222

Charges - Certification - Construction Industry - Reconsideration - Employee making "non-pay" allegation and seeking revocation of certificate - Facts pleaded not disclosing "non-pay" - Board reviewing and applying *Calvano Lumber* case in respect of "loan" issue and effect on Form 80 declaration - Reconsideration application dismissed

KEN ACTON PLUMBING & HEATING INC.; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES (Feb.) 187

Charges - Certification - Evidence - Membership Evidence - Witness - Witness in non-pay inquiry testifying that she paid \$1 when applying for union membership - Witness acknowledging in cross-examination that she had made previous inconsistent statements - Board declining to accept witness' prior inconsistent statements as evidence of the truth of their contents - Board having no affirmative evidence that witness did not pay a dollar in regard to her application - Non-pay allegation dismissed

CAMARO ENTERPRISES LIMITED; RE IUOE, LOCAL 793; RE GROUP OF EMPLOYEES (July) 772

Charges - Certification - Evidence - Representation Vote - Four employees who had not been on voters' list casting ballots - Employees arguing that they properly belong in bargaining unit and that their ballots should be counted - Board ruling that their segregated ballots not be

counted and that it would not inquire further into their duties and responsibilities - Board permitting union to call evidence of handwriting expert as part of defence to forgery allegation in non-pay/non-sign inquiry - Board determining that card submitted by union reliable - Board commenting on procedure where non-pay/non-sign allegations raised subsequent to representation vote - Certificate issuing

MOORE CORPORATION LIMITED; RE GRAPHIC COMMUNICATION INTERNATIONAL UNION, LOCAL N-1; RE GROUP OF EMPLOYEES..... (May)

614

Charges - Certification - Petition - Intimidation and Coercion - Board finding reaffirmation document submitted by union representing voluntary wishes of those signing it - Objectors' charges of union misconduct not established on the evidence - Board declining to draw inference of intimidation from fact that employees of Vietnamese origin overwhelmingly supported union and resisted objectors' efforts to persuade them to contrary view - Certificate issuing

RIVERSIDE FABRICATING LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES.....(Aug.)

958

Charges - Certification - Practice and Procedure - Inquiry into non-pay allegation disclosing loan by fellow employee and repayment - Board seeing no reason to direct hearing into allegation - Board to dispose of certification application without further notice unless it receives submissions from any party showing why the Board should hold a hearing into the allegation

BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE U.P.G.W.A. (Jan.)

15

Charges - Evidence - Intimidation and Coercion - Judicial Review - Representation Vote - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking judicial review on grounds that Board answered wrong question, applied wrong legal test and made unreasonable findings of fact - Application for judicial review dismissed by Divisional Court

POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB..... (June)

766

Charges - Evidence - Intimidation and Coercion - Judicial Review - Representation Vote - Stay - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking stay of union's certification pending hearing of judicial review application by Divisional Court - Stay application dismissed on consent

POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB..... (May)

662

Charges - Evidence - Intimidation and Coercion - Representation Vote - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert evidence on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that conduct of union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of

vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing

POLYTECH COATINGS LIMITED; RE C.A.W.; RE GROUP OF EMPLOYEES.....(Mar.) 362

Charges - Fraud - Reconsideration - Termination - Employee alleging that union obtained its certificate by fraud and that bargaining rights should be terminated - Board determining that certain allegations not contributing to *prima facie* case - Other allegations dismissed on basis of lack of particularity and delay - Reconsideration application and termination application dismissed

CAMBRIDGE REPORTER; RE DIRK KOEHLER, FOR THE EMPLOYEES OF THE CAMBRIDGE REPORTER; RE THE SOUTHERN ONTARIO NEWSPAPER GUILD UNIT, CAMBRIDGE, ONT. (LOCAL 87)..... (Oct.) 1059

Charter of Rights - Constitutional Law - Construction Industry - Judicial Review - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Merger in compliance with union constitution - Constitution not requiring membership approval - Board issuing declaration of successor status - Divisional Court upholding Board decision - Failure to hold vote not infringing Charter right to freedom of association - Board operated within limits of statutory discretion in making successor declaration - Leave to appeal from order of Divisional Court denied by Court of Appeal

I.B.E.W., LOCAL 586 AND THE OLRB; RE I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH (July) 889

Collective Agreement - Abandonment - Accreditation - Bargaining Rights - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (July) 885

Collective Agreement - Abandonment - Accreditation - Bargaining Rights - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Stay - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for stay of Board decision pending judicial review - Stay application dismissed by Divisional Court for failing to establish strong *prima facie* case

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (June) 764

- Collective Agreement - Abandonment - Accreditation - Bargaining Rights - Construction Industry - Construction Industry Grievance - Employer support - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed
- ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894..... (Feb.) 147
- Collective Agreement - Certification - Change in Working Conditions - Construction Industry - Employer Support - Timeliness - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the *Act* - Certification application dismissed as being untimely
- STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C..... (Sept.) 1049
- Collective Agreement - Certification - Timeliness - Whether collective agreement in effect between incumbent union and employer and, consequently, operating to bar instant certification application - Board not satisfied either that bargaining had come to a complete end, or that all of the precise terms of the collective agreement asserted by incumbent union can be ascertained - Union's objection with respect to collective agreement bar dismissed and Board directing that representation vote be taken
- MULLER'S MEATS LIMITED; RE MULLER'S MEATS EMPLOYEES ASSOCIATION; RE R.W.D.S.U. AFL:CIO:CLC(Aug.) 942
- Collective Agreement - Construction Industry - Construction Industry Grievance - Whether union holding bargaining rights with respect to any of employer's employees - Employer conceding that it was member of Sarnia Construction Association (SCA) when 1975 collective agreement between union and SCA representing those companies defined as "members" of SCA entered into - Employer asserting, however, failure to define who were "members" of the S.C.A. - Board having no difficulty in finding that all entities which were members of the SCA, as defined in its By-law Number 1, were bound by that collective agreement and that respondent employer bound to current Provincial collective agreement
- C.H. HEIST LTD.; RE C.J.A., LOCAL UNION 18..... (June) 677
- Collective Agreement - Construction Industry - Duty of Fair Representation - Unfair Labour Practice - Employer and employee bargaining agencies for "electrical-trade" portion of ICI sector of construction industry settling renewal of collective agreement expiring April 30, 1992 - Settlement made on February 14, 1992 also amending existing ICI agreement ten weeks prior to its April 30th expiry date - Whether the two e.b.a.'s without jurisdiction to amend existing provincial agreement - Whether employer bargaining agency breaching duty of fair representation - Whether whole settlement should be set aside - Complaint brought by Sarnia contractors dismissed
- ELECTRICAL CONTRACTORS ASSOCIATION OF SARNIA; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO, I.B.E.W., AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO(Apr.) 435
- Collective Agreement - Construction Industry - Employer Support - Related Employer - Reme-

dies - Voluntary Recognition - Board rejecting respondent's submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union's low-rise residential agreement

WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353 (Feb.)

262

Constitutional Law - Certification - Construction Industry - Employer in business of installing, testing, maintaining and servicing antennae for cellular phone systems - Board concluding that employer's operations integrally related to federal works or undertakings and subject to federal jurisdiction in matters of labour relations

CANADIAN COMMUNICATIONS STRUCTURES INC.; RE IRONWORKERS DISTRICT COUNCIL (July)

777

Constitutional Law - Construction Industry - Charter of Rights - Judicial Review - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Merger in compliance with union constitution - Constitution not requiring membership approval - Board issuing declaration of successor status - Divisional Court upholding Board decision - Failure to hold vote not infringing Charter right to freedom of association - Board operated within limits of statutory discretion in making successor declaration - Leave to appeal from order of Divisional Court denied by Court of Appeal

I.B.E.W., LOCAL 586 AND THE OLRB; RE I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH (July)

889

Constitutional Law - Construction Industry - Construction Industry Grievance - Board dismissing employer's submission that construction of banks within sphere of federal labour relations - Board assuming jurisdiction to deal with grievance

TORONTO DOMINION BANK; RE C.J.A., LOCAL 785 (Oct.)

1123

Construction Industry - Jurisdictional Dispute - Interim National Agreement between Sheet Metal Workers' and Plumbers' unions made in mid-1950s - Sheet Metal Workers' union and its locals only recently seeking to rely on Agreement to assert claim to exclusive jurisdiction over work in dispute - Board not determining complaint on basis of Interim National Agreement without consideration of other criteria

KORA MECHANICAL INC. AND U.A., LOCAL UNION 67; RE S.M.W., LOCAL 537; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP (June)

740

Construction Industry - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar

before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (July) 885

Construction Industry - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry Grievance - Employer Support - Judicial Review - Stay - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for stay of Board decision pending judicial review - Stay application dismissed by Divisional Court for failing to establish strong *prima facie* case

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (June) 764

Construction Industry - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry Grievance - Employer support - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed

ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894 (Feb.) 147

Construction Industry - Abandonment - Bargaining Rights - Construction Industry Grievance - Employer - Board determining that Carpenters' union had not abandoned its bargaining rights in the ICI sector prior to March 1978 - Board adopting and applying *Metro Toronto #2* case and rejecting argument that respondent was acting in capacity of owner and purchaser of construction services and not as employer in the construction industry

SHELL CANADA LIMITED; RE C.J.A., LOCAL 1988 (Nov.) 1231

Construction Industry - Abandonment - Bargaining Rights - Construction Industry Grievance - Employer submitting that grievance ought to be dismissed for reasons of delay, prejudice suffered as a result of such delay and that doctrine of laches applying - Employer also submitting that union's bargaining rights abandoned - Employer not suffering the prejudice asserted and Board finding no abandonment - Board finding union estopped from asserting its rights pursuant to ICI agreement, but not determining length of estoppel - Grievance dismissed

STEDS LIMITED; RE L.I.U.N.A., LOCAL 493 (Jan.) 67

Construction Industry - Abandonment - Bargaining Rights - Construction Industry Grievance - Sale of a Business - Board applying *Lorne's Electric* case and finding that predecessor employer bound to Carpenters' provincial collective agreement at time of sale - Delay in asserting bargaining rights not affecting remedies under section 64 of the *Act* - Board

declaring successor bound by predecessor's collective agreement - Board remaining seized with respect to remaining issues arising under grievance

BANCLIFFE CONTRACTING & CONSTRUCTION, 203733 ONTARIO INC. (FORMERLY KNOWN AS BANCLIFFE CONTRACTING & CONSTRUCTION LIMITED) NOW OPERATING AS BANCLIFFE INTERIORS, SHELDON ASSOCIATES LTD. OPERATING AS; RE C.J.A., LOCAL 27 (Sept.)

990

Construction Industry - Adjourment - Bargaining Rights - Construction Industry Grievance - Judicial Review - Board denying request for adjournment pending disposition of judicial review application in different proceeding - Union asserting that issue of whether employer bound by provincial ICI agreement *res judicata* as a result of earlier *Ellis-Don* decision - Board finding all necessary elements of issue estoppel branch of doctrine of *res judicata* present - No cogent reason not to apply earlier *Ellis-Don* decision to current applications - Employer precluded from contesting union's assertion that it is bound by provincial agreement

ELLIS-DON LIMITED; RE I.B.E.W. LOCAL 105 (Sept.)

999

Construction Industry - Adjourment - Certification - Construction Industry Grievance - Evidence - Practice and Procedure - Related Employer - Board permitting employer to use tape-recorder but not hand-held video camera to record proceedings - Board denying request for adjournment so that ruling on video camera might be appealed - Board directing all parties to set out all facts and to list and produce all documents upon which they intend to rely prior to next hearing date - Board commenting on standards of decorum to which parties appearing before the Board must adhere

BEMAR CONSTRUCTION (ONTARIO) INC.; RE I.B.E.W., LOCAL 353 (May)

565

Construction Industry - Adjourment - Certification - Parties - Practice and Procedure - Given wording of union's proposed bargaining unit description, Board declining adjournment request to give notice to Canadian Pipe Fabricators Association and to Plumbers' union - Board declining to defer certification application pending determination of two section 126 referrals of grievances to arbitration - Board denying requested adjournment and extension of terminal date because of intervener's certification application - Board ruling that its practice in dealing with intervener applications filed on or before "original" certification application's terminal date is to have that intervener application governed by "original" application's application and terminal dates

E.S. FOX LIMITED; RE SHOPMEN'S LOCAL 834 OF THE B.S.O.I.W.; RE C.J.A. ON BEHALF OF LOCALS 1007, 1151, 1244, 1410, 1425, 1592, 1916 AND 2309; RE U.A., LOCAL UNION 666; RE I.B.E.W., LOCAL 303; RE I.U.O.E., LOCAL 793 (June)

693

Construction Industry - Adjourment - Construction Industry Grievance - Board rejecting employer submission that balance of convenience favouring granting adjournment and that it may suffer substantial and potentially irreparable prejudice if adjournment not granted - Adjourment request denied

ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 105 (Nov.)

1191

Construction Industry - Adjourment - Construction Industry Grievance - Jurisdictional Dispute - Applicant union resisting employer and intervener union's request that Board defer consideration of grievance to allow filing of jurisdictional dispute complaint - Board seeing no reason why jurisdictional dispute forum not appropriate to deal with situation where work assignment given by contractor to trade with which it does not have collective agreement - Grievance adjourned and to be listed with pending jurisdictional dispute

ELLIS-DON CONSTRUCTION LTD.; RE P.A.T.; RE B.S.O.I.W., LOCAL 736 . (Oct.)

1071

Construction Industry - Adjournment - Construction Industry Grievance - Parties - Practice and Procedure - Board denying requested adjournment to seek counsel made by parties seeking to intervene in proceeding - Carpenters' union alleging that work covered under collective agreement with Metro Toronto being performed by other than its members - Contractors seeking to intervene on the ground that they have financial interest in litigation between Carpenters' union and Metro - Board denying contractors intervener status

MUNICIPALITY OF METROPOLITAN TORONTO; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A. (July) 817

Construction Industry - Adjournment - Evidence - Jurisdictional Dispute - Practice and Procedure - Board declining to allow respondent union to make preliminary objection where it had not been included in the union's pre-hearing brief in accordance with Practice Note #15 - Board not allowing respondent union to lead evidence with respect to area practice where union neglected to include job or project lists in its pre-hearing brief - Board allowing evidence of employer practice throughout the province (and not exclusively in Board Area 3) - Having regard to parties consenting to adjourn 12 of 13 days set by Board for hearing, Board declining to set further hearing dates unless request received within 1 month - Board indicating that there will be no consultation with the parties with respect to available dates

ELLIS-DON LIMITED AND O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059 AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL (June) 695

Construction Industry - Adjournment - Practice and Procedure - Related Employer - Board denying adjournment request made because respondents attempted to retain counsel virtually at last minute - Whether respondent companies engaged in related activities - But for "plumbing" work, activities of the two companies identical - Board holding that merely because a very small part of the work performed by the second respondent would be covered by the collective agreement with the first respondent not sufficient reason to deny union its remedy - Declaration issuing

ACME PLUMBING & HEATING, VINCENT J. TRUDEAU & SONS INC. C.O.B. AS, AND 883553 ONTARIO INC. C.O.B. AS ACME BIVALENT SYSTEMS; RE U.A., LOCAL 463 (Jan.) 1

Construction Industry - Bargaining Rights - Bargaining Unit - Certification - Natural Justice - Reconsideration - Employer submitting that Board's decision in *O.J. Pipelines* incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed

TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES (Jan.) 90

Construction Industry - Bargaining Unit - Certification - Pre-Hearing Vote - Parties disputing whether intervener having valid collective agreement with employer - Applicant asking that, in addition to standard question on displacement application, ballot contain standard question on certification application - Board noting that it would be confusing and inappropriate to attempt to "cover all the bases" in vote by asking series of questions - Board concluding that given appearance of displacement application, usual question on displacement application, and only that question, to be asked on ballot

ABS MASONRY, 419990 ONTARIO LTD. C.O.B. AS; RE B.A.C., LOCAL 2 AND B.M.I.U., LOCAL 1 (May) 535

- Construction Industry - Bargaining Unit - Termination - Applicant and supporting employees not members of the union and not hired through the hiring hall - Whether employees bringing the termination application entitled to support and bring the application - Board regarding reasoning in *April Waterproofing* decision applicable - Application dismissed
 KEN ACTON PLUMBING & HEATING INC.; RE PAUL MCCONACHIE AND U.A., LOCAL 27..... (May) 604
- Construction Industry - Certification - Board dismissing union's certification application in accordance with Practice Note #7, but declining employer's request to impose 6 month bar on future applications for certification
 BELAIR RESTORATION (ONTARIO) INC., BELAIR RESTORATION (OTTAWA); RE O.P.C.M., LOCAL UNION 172 RESTORATION STEEPLEJACKS (Jan.) 13
- Construction Industry - Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Unfair Labour Practice - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing
 WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105 (Jan.) 101
- Construction Industry - Certification - Certification Where Act Contravened - Employee - Employer - Dependent Contractor - Discharge - Unfair Labour Practice - Electrical subcontractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing
 GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687 (July) 800
- Construction Industry - Certification - Change in Working Conditions - Collective Agreement - Employer Support - Timeliness - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the *Act* - Certification application dismissed as being untimely
 STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C. (Sept.) 1049
- Construction Industry - Certification - Charges - Reconsideration - Employee making "non-pay" allegation and seeking revocation of certificate - Facts pleaded not disclosing "non-pay" - Board reviewing and applying *Calvano Lumber* case in respect of "loan" issue and effect on Form 80 declaration - Reconsideration application dismissed
 KEN ACTON PLUMBING & HEATING INC.; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES (Feb.) 187
- Construction Industry - Certification - Constitutional Law - Employer in business of installing, testing, maintaining and servicing antennae for cellular phone systems - Board concluding that employer's operations integrally related to federal works or undertakings and subject to federal jurisdiction in matters of labour relations
 CANADIAN COMMUNICATIONS STRUCTURES INC.; RE IRONWORKERS DISTRICT COUNCIL (July) 777
- Construction Industry - Certification - Dependent Contractor - Employer - Whether certain indi-

viduals or entities properly characterized as 'employees' or 'dependent contractors', or as 'independent contractors' - Board finding certain entities not dependent on respondent employer and therefore 'independent contractors' - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the *Act* - Certificates issuing

ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.;
RE CARPENTERS & ALLIED WORKERS LOCAL 27, C.J.A.....(Aug.)

891

Construction Industry - Certification - Employee - Evidence - Practice and Procedure - Board satisfied that certain documents properly admitted as exhibits by Officer conducting examination in the exercise of his discretion - *E. & E. Seegmiller* case explained - Onus of proof regarding employee list issues lying with party seeking to exclude the person whose status is in question, except where it would have to prove a negative in order to succeed

CAMARO ENTERPRISES LIMITED C.O.B. AS MULДАР CONSTRUCTION AND
C.O.B. AS PARK TRUCKING, WALTER AMBROZIK, ERWIN MOWATSKI, ANNE
MOWATSKI; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES.....(Apr.)

423

Construction Industry - Certification - Employee on training course held not "at work" in the unit for purposes of the count - Board rejecting argument that four employees at work in proposed bargaining unit on the application date should be included on list of employees even though they were not qualified pursuant to *Trades Act* to work in the electrician trade - Board holding that even if lawfully employed, the four employees would share no real community of interest with the journeymen and apprentice electricians

SITECO ELECTRIC LTD. AND LEO ALARIE AND SONS LIMITED; RE I.B.E.W.;
RE I.U.O.E., LOCAL 793.....(Mar.)

383

Construction Industry - Certification - Employer - Evidence - Practice and Procedure - Unfair Labour Practice - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing - Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date

GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN
BAND; RE L.I.U.N.A., LOCAL 607(Feb.)

174

Construction Industry - Certification - Petition - Petitioner's own characterization of his position to employees he solicited, and the freedom with which he moved about and interrupted employees' work in making those solicitations, in the presence of actual members of management, satisfying Board that the employee perspective would likely have been to link the petitioning activities to the employer - Board according no weight to petition - Certificate issuing

CAMARO ENTERPRISES LIMITED; RE I.U.O.E. LOCAL 793; RE GROUP OF
EMPLOYEES.....(Aug.)

901

Construction Industry - Certification - Petition - Practice and Procedure - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board concluding that petition involuntary viewing petitioners' evidence in the best light, from the petitioners' perspective - Certificate issuing

HURLEY CORPORATION; RE LABOURERS' INTERNATIONAL UNION OF
NORTH AMERICA; RE GROUP OF EMPLOYEES(May)

582

Construction Industry - Certification - Petition - Practice and Procedure - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board observing that fairness and natural justice not demanding that moving party make election whether or not to call evidence in every case - No party asking that union be put to its election in this case and Board exercising its discretion not to require union to elect

HURLEY CORPORATION; RE L.I.U.N.A.; RE GROUP OF EMPLOYEES(Aug.)

940

Construction Industry - Certification - Pre-Hearing Vote - Representation Vote - Practice and Procedure - Board reconsidering its customary practice with respect to voter eligibility in construction industry certification applications and concluding that dual voter eligibility dates not appropriate - Board determining that in construction industry certification applications, those eligible to vote will be those at work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date

CRETE FLOORING GROUP LIMITED; RE L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 (July)

792

Construction Industry - Certification - Pre-Hearing Vote - Representation Vote - Reconsideration - Unfair Labour Practice - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in *Crete Flooring* case - Nothing in *Crete Flooring* suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed

METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 (Sept.)

1007

Construction Industry - Certification - Related Employer - Remedies - Board finding developer, owner and contractor to be separate entities under common control and direction engaged in related activity - Board exercising discretion to grant single employer declaration limited to agreed to bargaining unit - Certificates issuing

ITALIAN CANADIAN BENEVOLENT CORPORATION (TORONTO DISTRICT); RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A. (Oct.)

1074

Construction Industry - Certification - Union applying for certification in spring of 1991 and Board conducting pre-hearing vote - Application dismissed after ballots counted in April 1992 - Union filing second application in February 1992 - Whether Board should impose bar on second application - Having regard to competing interests and nature of employment in construction industry, Board satisfied that it would not be appropriate to refuse to entertain second application

STEPHENS AND RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C. (June)

762

Construction Industry - Collective Agreement - Construction Industry Grievance - Whether union holding bargaining rights with respect to any of employer's employees - Employer conceding that it was member of Sarnia Construction Association (SCA) when 1975 collective agreement between union and SCA representing those companies defined as "members" of SCA entered into - Employer asserting, however, failure to define who were "members" of the S.C.A. - Board having no difficulty in finding that all entities which were members of the SCA, as defined in its By-law Number 1, were bound by that collective agreement and that respondent employer bound to current Provincial collective agreement

C.H. HEIST LTD.; RE C.J.A., LOCAL UNION 18 (June)

677

- Construction Industry - Collective Agreement - Duty of Fair Representation - Unfair Labour Practice - Employer and employee bargaining agencies for "electrical-trade" portion of ICI sector of construction industry settling renewal of collective agreement expiring April 30, 1992 - Settlement made on February 14, 1992 also amending existing ICI agreement ten weeks prior to its April 30th expiry date - Whether the two e.b.a.'s without jurisdiction to amend existing provincial agreement - Whether employer bargaining agency breaching duty of fair representation - Whether whole settlement should be set aside - Complaint brought by Sarnia contractors dismissed
- ELECTRICAL CONTRACTORS ASSOCIATION OF SARNIA; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO, I.B.E.W., AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO (Apr.) 435
- Construction Industry - Collective Agreement - Employer Support - Related Employer - Remedies - Voluntary Recognition - Board rejecting respondent's submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union's low-rise residential agreement
- WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353 (Feb.) 262
- Construction Industry - Constitutional Law - Charter of Rights - Judicial Review - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Merger in compliance with union constitution - Constitution not requiring membership approval - Board issuing declaration of successor status - Divisional Court upholding Board decision - Failure to hold vote not infringing Charter right to freedom of association - Board operated within limits of statutory discretion in making successor declaration - Leave to appeal from order of Divisional Court denied by Court of Appeal
- I.B.E.W., LOCAL 586 AND THE OLRB; RE I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH (July) 889
- Construction Industry - Constitutional Law - Construction Industry Grievance - Board dismissing employer's submission that construction of banks within sphere of federal labour relations - Board assuming jurisdiction to deal with grievance
- TORONTO DOMINION BANK; RE C.J.A., LOCAL 785 (Oct.) 1123
- Construction Industry - Construction Industry Grievance - Contempt - Employer failing to attend and bring records to hearing as directed by Board - Board advised that on day of hearing, employer delivering certain records to union office - Board citing employer for contempt and issuing arrest warrant for next day of hearing - Parties to have further opportunity at next day of hearing to address characterization of employer's previous failure to comply with Board's directive and any penalty therefor
- CRESTVIEW MASONRY CO. LTD.; RE B.M.I.U., LOCAL 1 (Oct.) 1068
- Construction Industry - Construction Industry Grievance - Evidence - Practice and Procedure - Sector Determination - Parties disputing scope of work and scope of evidence relevant to sector determination - Board deciding that parties free to rely on industry practice throughout the province in regards to employee relations on the type of work in dispute - Subject of

sector determination identified as work related to installation of large underground concrete storage tanks associated with water treatment purposes

MATTHEWS CONTRACTING INC.; RE C.J.A., LOCAL 18; RE L.I.U.N.A.,
ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Oct.) 1088

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Whether Board having jurisdiction to hear grievances not dealing exclusively with work performed in the construction industry - Whether the UA should be permitted to intervene in grievance referral where it has not filed, and has expressed no intention to file, a jurisdictional dispute complaint - Board adopting reasons in *Babcock and Wilcox* case and assuming jurisdiction - Board determining that UA has no legal right to participate in proceedings and should not be given intervener status

E.S. FOX LIMITED; RE I.U.O.E. AND ITS LOCAL 793; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1007..... (Apr.) 431

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Practice and Procedure - Unfair Labour Practice - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers strict legal interest in proceedings, but exercising its discretion to grant Labourers standing

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS (Jan.) 47

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - General contractor subcontracting work to company having collective agreement with Labourers union, but not with Carpenters union - Carpenters grieving against general contractor alleging breach of subcontracting clause - Whether Board should defer consideration of grievance to allow filing and resolution of jurisdictional dispute complaint - Whether Board has jurisdiction under section 93 of the Act - Board satisfied that nature of grievance filed and its having been communicated to the subcontractor, constituting a demand for work within the meaning of s.93(1) and that Board having jurisdiction to entertain dispute as jurisdictional dispute

ROBERTSON YATES CORPORATION LIMITED; RE C.J.A., LOCAL UNION 785; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL (Apr.) 507

Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Work in dispute assigned to Sheet Metal Workers' union, and Plumbers' union filing grievance against employer - Sheet Metal Workers' union then filing jurisdictional dispute complaint against employer - Plumbers' and employer subsequently settling s. 126 application and asking that jurisdictional dispute be dismissed - No remaining work assignment dispute between the two trade unions - Board dismissing complaint and declining Sheet Metal Workers' request to award costs against Plumbers' union

FELIX LOPES SHEET METAL LTD. AND U.A., LOCAL 800; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 504; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP (June) 706

Construction Industry - Construction Industry Grievance - Practice and Procedure - Remedies - Board allowing union's grievance in May 1991 decision and remaining seized on the issue of damages - Subsequent to May 1991 decision, Vice-Chair of panel issuing decision dying - Employer arguing that Board without jurisdiction to substitute Vice-Chairs and that liability issue would have to be reheard - Board satisfied that it has jurisdiction to continue OTIS ELEVATOR COMPANY LIMITED; RE I.U.E.C., LOCAL 50..... (Apr.)	497
Construction Industry - Construction Industry Grievance - Remedies - Employer grieving against employee and against union alleging improper claim and receipt of room and board allowance - Employer claiming damages - Nothing in collective agreement giving Board the power to award damages against employee - Board dismissing employer's request for damages, but holding that declaratory relief available - Declaration issuing ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, H.F.I.A., AND H.F.I.A., LOCAL 95 AND JAMES C. CORD (Apr.)	445
Construction Industry - Construction Industry Grievance - Settlement - Labour-Management Relations Committee hearing grievance at Step 3 of grievance procedure and issuing decision - Union submitting that matter in dispute thereby settled pursuant to grievance procedure set out in collective agreement - Board upholding union's preliminary motion, concluding that grievance settled, and directing employer to comply with terms of settlement E.S. FOX LIMITED; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1007 (Jan.)	29
Construction Industry - Construction Industry Grievance - Union alleging failure to pay wage rate of appropriate classification - Whether time spent on lay-off, while otherwise available for work, to be counted in assessing whether Helper II has completed 36 months "in the industry" within meaning of collective agreement - Board concluding that lay-off periods not to be included in such assessment - Grievance dismissed OTIS ELEVATOR COMPANY LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50 (Sept.)	1013
Construction Industry - Construction Industry Grievance - Whether attending training course just outside Metro boundaries, as required by employer, entitling grievors to travel allowance under collective agreement - Board rejecting employer's distinction between assigning duties and assigning work - Employees entitled to travel allowance - Grievance allowed OTIS ELEVATOR CO.; RE I.U.E.C., LOCAL 50 (Jan.)	61
Construction Industry - Damages - Related Employer - Remedies - Board declaring that respondent companies be treated as one employer for purposes of the <i>Act</i> and not limiting retrospective effect of the declaration - Board also directing that second respondent pay union the unsatisfied damages, if any, arising out of a damages award made 7 months earlier against first respondent by another panel of the Board in a section 126 proceeding GOLDEN ARM FLOORING INC., R.R. PROJECTS INC.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27 CJA..... (June)	731
Construction Industry - Duty to Bargain in Good Faith - Unfair Labour Practice - Whether union breaching the duty to bargain by insisting that there be one collective agreement and one seniority list for construction work and non-construction work in the elevator industry in the province, and by refusing Association's request that union sign the same non-ICI agreement it had signed with some individual employers - Whether subsequent collective agreement removing grounds for the complaint proceeding - Complaint dismissed NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION; RE I.U.E.C., LOCALS 50, 90 AND 96 (Mar.)	345

- Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Ironworkers' union and Plumbers' union disputing assignment of signalling, rigging and other work - Board rejecting argument that complaint should not be heard because matter had been referred to The Plan for Settlement of Jurisdictional Disputes in the Construction Industry - Board finding that trade agreement with respect to work jurisdiction can be revoked or repudiated by one party to the agreement upon the giving of reasonable notice - Board holding that Cooper-Connolly agreement neither an 'international trade agreement', nor a 'local agreement' binding on the locals to this dispute - Board observing that it is the rare and unusual jurisdictional dispute complaint in which the Board does not attach primary weight to area and employer past practice - Board directing assignment of disputed work
EPSCA, ONTARIO HYDRO, U.A., LOCAL 46; RE B.S.O.I.W., LOCAL 721(Aug.) 915
- Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Parties requesting that Board decide, as preliminary matter, scope of relevant past practice evidence with respect to disputed work - Board ruling that evidence should be restricted to ICI sector and to precast concrete ducts (as opposed to all conduit duct banks)
ADAM CLARK COMPANY LTD., I.B.E.W., LOCAL 350 AND; RE L.I.U.N.A., LOCAL 1089.....(Jan.) 6
- Construction Industry - Jurisdictional Dispute - Practice and Procedure - Board noting general tendency by parties to submit "boiler plate" briefs lacking in particularity in complaints with respect to assignment of work - Board observing that this approach not only retards and undermines pre-hearing process, but also tends to unnecessarily prolong and complicate the hearing of such a complaint
E. S. FOX LTD. AND S.M.W., LOCAL 269; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO, LOCAL 1410; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP (Feb.) 145
- Construction Industry - Jurisdictional Dispute - Work in connection with installation of monorail conveyor system in dispute - Millwrights seeking exclusive assignment of work in dispute, but Ironworkers seeking assignment to their members as part of crew made up of equal numbers of members of both unions - While three of the four non-neutral criteria pointing to assignment of work to Millwrights, Board satisfied by evidence as a whole, and particularly evidence surrounding area past practice, that work should be assigned to composite crew
ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC. AND B.S.O.I.W., RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1244..... (May) 537
- Construction Industry - Jurisdictional Dispute - Work in dispute involving installation of wash-room accessories - General contractor assigning work to carpenters directly employed by it - Plumbers' union relying on International Agreement to claim work - General contractor not employing any plumbers directly and having no collective agreement with Plumbers' union - Board upholding complaint that work should have been assigned in accordance with International Agreement
PIGOTT CONSTRUCTION LIMITED; RE U.A., LOCAL 46; RE C.J.A., LOCAL 27, AND L.I.U.N.A., LOCAL 506..... (June) 748
- Construction Industry - Natural Justice - Practice and Procedure - Reconsideration - Termination - Applicant filing termination application after terminal date of earlier application brought by different applicant - Earlier application still pending before the Board - Board assigning terminal date and hearing date to subsequent application but, upon discovering that earlier application had been filed, Board cancelling hearing - Parties' attention drawn to s. 105(3)

of the *Act* - Applicant seeking reconsideration - Board rejecting submission that rules of natural justice requiring that parties be afforded opportunity to make submissions before Board exercises discretion pursuant to s.105(3) - Board affirming decision to defer subsequent application pending determination of earlier application - Reconsideration request denied

A & G METRO ROOFING LTD.; RE SIMONE IAQUINTA; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS CONFERENCE, S.M.W. AND S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562..... (July)

769

Construction Industry - Parties - Termination - Union challenging standing of named applicant to bring application and arguing that application a nullity which may not be amended - Since named applicant not at work in bargaining unit on date of application, named applicant without status to bring application - Board, however, questioning utility of technical approach based on existence of "cause of action" and applicability of that approach in labour relations context - Board exercising its discretion under Rules of Procedure to add named petitioners as party applicants

INDUSTRIAL METAL FABRICATORS LIMITED; RE STEPHEN MYERS, RE S.M.W., THE ONTARIO SHEET METAL WORKERS' CONFERENCE AND AFFILIATED BARGAINING AGENTS, LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539, 562 (Oct.)

1083

Construction Industry - Related Employer - Remedies - Parties agreeing that legal requirements for single employer declaration present - Whether, in view of conduct of employees or union's business representative, Board should exercise its discretion to issue declaration - Board making section 1(4) declaration, but limiting its effect to those commercial activities or contracts entered into after receipt of section 1(4) application

JARRETT CONSTRUCTION LTD. AND JARRETT COMMERCIAL CONTRACTING; RE C.J.A., LOCAL 27..... (May)

586

Construction Industry - Representation Vote - Termination - Board applying reasoning of *Crete Flooring Group* decision to termination representation votes in construction industry - Board determining that in construction industry termination applications, those eligible to vote will be those at work in the bargaining unit on the application date

WALDEN ROOFING & SHEET METAL CO. LIMITED; RE DONALD FEENER; RE S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562 (Aug.)

971

Construction Industry - Sale of a Business - Related Employer - Woodwork company sold by "F" going bankrupt - "F" incorporating new company, purchasing some of bankrupt company's equipment and carrying on substantially same business - Board finding "F" to be "key person" - Related employer declaration issuing - Board also finding sale of a business and declaring that union has bargaining rights for employees of successor employer

ECONOMY STORE FIXTURES LIMITED AND FLAIR WOODWORKING LTD.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A.; RE CANADIAN WOODWORK MANUFACTURERS ASSOCIATION (May)

575

Construction Industry - Strike - Unfair Labour Practice - Teamsters complaining that, by setting up picket line at excavation site, members of respondent Aggregate Haulers Benevolent Association performing act which they knew would lead employees at site to engage in unlawful strike - Evidence disclosing that picketers talking to some drivers and delaying some for periods between 3 to 10 minutes, but Board hearing no evidence that operation of employer disrupted - Board hearing no evidence as to content of any conversations with drivers - Board ruling that evidence not making out necessary components of illegality -

Application for relief under section 94 of the Act dismissed - Unfair labour practice complaint based on same allegations considered adjourned sine die

ONTARIO AGGREGATE HAULERS BENEVOLENT ASSOCIATION AND LOR-
ENZO BORRELLI, AND ANGELO NATALE; RE TEAMSTERS, LOCAL 230,
READY MIX, BUILDING, SUPPLY, HYDRO & CONSTRUCTION DRIVERS,
WAREHOUSEMEN & HELPERS OF THE TEAMSTERS UNION (Apr.)

489

Construction Industry - Termination - Board considering termination application in circumstance where at all material times there has been, and for the foreseeable future there is likely to be, only one employee in the bargaining unit - Board observing that it makes no sense to send Board Officer to Owen Sound, with ballot box, to receive one ballot - Parties agreeing that Board send applicant a ballot in the usual form asking him whether he wishes to continue to be represented by the union - Applicant to return ballot to Board by registered mail on specified date

FLUKER ELECTRICAL MECHANICAL CONTRACTORS, DIVISION OF H.
FLUKER CONSULTANTS INC.; RE MICHAEL PORTER; RE I.B.E.W., I.B.E.W.,
LOCAL 804 (Apr.)

458

Construction Industry Grievance - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (July)

885

Construction Industry Grievance - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Employer Support - Judicial Review - Stay - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for stay of Board decision pending judicial review - Stay application dismissed by Divisional Court for failing to establish strong *prima facie* case

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (June)

764

Construction Industry Grievance - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Employer support - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance

- ance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed
- ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894..... (Feb.) 147
- Construction Industry Grievance - Abandonment - Bargaining Rights - Construction Industry - Employer - Board determining that Carpenters' union had not abandoned its bargaining rights in the ICI sector prior to March 1978 - Board adopting and applying *Metro Toronto #2* case and rejecting argument that respondent was acting in capacity of owner and purchaser of construction services and not as employer in the construction industry
- SHELL CANADA LIMITED; RE C.J.A., LOCAL 1988..... (Nov.) 1231
- Construction Industry Grievance - Abandonment - Bargaining Rights - Construction Industry - Employer submitting that grievance ought to be dismissed for reasons of delay, prejudice suffered as a result of such delay and that doctrine of laches applying - Employer also submitting that union's bargaining rights abandoned - Employer not suffering the prejudice asserted and Board finding no abandonment - Board finding union estopped from asserting its rights pursuant to ICI agreement, but not determining length of estoppel - Grievance dismissed
- STEDS LIMITED; RE L.I.U.N.A., LOCAL 493 (Jan.) 67
- Construction Industry Grievance - Abandonment - Bargaining Rights - Construction Industry - Sale of a Business - Board applying *Lorne's Electric* case and finding that predecessor employer bound to Carpenters' provincial collective agreement at time of sale - Delay in asserting bargaining rights not affecting remedies under section 64 of the *Act* - Board declaring successor bound by predecessor's collective agreement - Board remaining seized with respect to remaining issues arising under grievance
- BANCLIFFE CONTRACTING & CONSTRUCTION, 203733 ONTARIO INC. (FORMERLY KNOWN AS BANCLIFFE CONTRACTING & CONSTRUCTION LIMITED) NOW OPERATING AS BANCLIFFE INTERIORS, SHELDON ASSOCIATES LTD. OPERATING AS; RE C.J.A., LOCAL 27 (Sept.) 990
- Construction Industry Grievance - Adjourment - Bargaining Rights - Construction Industry - Judicial Review - Board denying request for adjourment pending disposition of judicial review application in different proceeding - Union asserting that issue of whether employer bound by provincial ICI agreement *res judicata* as a result of earlier *Ellis-Don* decision - Board finding all necessary elements of issue estoppel branch of doctrine of *res judicata* present - No cogent reason not to apply earlier *Ellis-Don* decision to current applications - Employer precluded from contesting union's assertion that it is bound by provincial agreement
- ELLIS-DON LIMITED; RE I.B.E.W. LOCAL 105..... (Sept.) 999
- Construction Industry Grievance - Adjourment - Certification - Construction Industry - Evidence - Practice and Procedure - Related Employer - Board permitting employer to use tape-recorder but not hand-held video camera to record proceedings - Board denying request for adjourment so that ruling on video camera might be appealed - Board directing all parties to set out all facts and to list and produce all documents upon which they intend to rely prior to next hearing date - Board commenting on standards of decorum to which parties appearing before the Board must adhere
- BEMAR CONSTRUCTION (ONTARIO) INC.; RE I.B.E.W., LOCAL 353 (May) 565
- Construction Industry Grievance - Adjourment - Construction Industry - Board rejecting employer submission that balance of convenience favouring granting adjourment and that

it may suffer substantial and potentially irreparable prejudice if adjournment not granted -
Adjournment request denied

ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 105(Nov.) 1191

Construction Industry Grievance - Adjournment - Construction Industry - Jurisdictional Dispute -
Applicant union resisting employer and intervener union's request that Board defer consid-
eration of grievance to allow filing of jurisdictional dispute complaint - Board seeing no rea-
son why jurisdictional dispute forum not appropriate to deal with situation where work
assignment given by contractor to trade with which it does not have collective agreement -
Grievance adjourned and to be listed with pending jurisdictional dispute

ELLIS-DON CONSTRUCTION LTD.; RE P.A.T.; RE B.S.O.I.W., LOCAL 736 . (Oct.) 1071

Construction Industry Grievance - Adjournment - Construction Industry - Parties - Practice and
Procedure - Board denying requested adjournment to seek counsel made by parties seeking
to intervene in proceeding - Carpenters' union alleging that work covered under collective
agreement with Metro Toronto being performed by other than its members - Contractors
seeking to intervene on the ground that they have financial interest in litigation between
Carpenters' union and Metro - Board denying contractors intervener status

MUNICIPALITY OF METROPOLITAN TORONTO; RE CARPENTERS AND
ALLIED WORKERS, LOCAL 27, C.J.A.....(July) 817

Construction Industry Grievance - Collective Agreement - Construction Industry - Whether
union holding bargaining rights with respect to any of employer's employees - Employer
conceding that it was member of Sarnia Construction Association (SCA) when 1975 collec-
tive agreement between union and SCA representing those companies defined as "mem-
bers" of SCA entered into - Employer asserting, however, failure to define who were
"members" of the S.C.A. - Board having no difficulty in finding that all entities which were
members of the SCA, as defined in its By-law Number 1, were bound by that collective
agreement and that respondent employer bound to current Provincial collective agreement

C.H. HEIST LTD.; RE C.J.A., LOCAL UNION 18 (June) 677

Construction Industry Grievance - Constitutional Law - Construction Industry - Board dismissing
employer's submission that construction of banks within sphere of federal labour relations -
Board assuming jurisdiction to deal with grievance

TORONTO DOMINION BANK; RE C.J.A., LOCAL 785 (Oct.) 1123

Construction Industry Grievance - Construction Industry - Contempt - Employer failing to attend
and bring records to hearing as directed by Board - Board advised that on day of hearing,
employer delivering certain records to union office - Board citing employer for contempt
and issuing arrest warrant for next day of hearing - Parties to have further opportunity at
next day of hearing to address characterization of employer's previous failure to comply
with Board's directive and any penalty therefor

CRESTVIEW MASONRY CO. LTD.; RE B.M.I.U., LOCAL 1..... (Oct.) 1068

Construction Industry Grievance - Construction Industry - Evidence - Practice and Procedure -
Sector Determination - Parties disputing scope of work and scope of evidence relevant to
sector determination - Board deciding that parties free to rely on industry practice through-
out the province in regards to employee relations on the type of work in dispute - Subject of
sector determination identified as work related to installation of large underground con-
crete storage tanks associated with water treatment purposes

MATTHEWS CONTRACTING INC.; RE C.J.A., LOCAL 18; RE L.I.U.N.A.,
ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Oct.) 1088

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - Parties -

Whether Board having jurisdiction to hear grievances not dealing exclusively with work performed in the construction industry - Whether the UA should be permitted to intervene in grievance referral where it has not filed, and has expressed no intention to file, a jurisdictional dispute complaint - Board adopting reasons in *Babcock and Wilcox* case and assuming jurisdiction - Board determining that UA has no legal right to participate in proceedings and should not be given intervener status

E.S. FOX LIMITED; RE I.U.O.E. AND ITS LOCAL 793; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1007..... (Apr.)

431

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - Parties - Practice and Procedure - Unfair Labour Practice - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers strict legal interest in proceedings, but exercising its discretion to grant Labourers standing

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS (Jan.)

47

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - Practice and Procedure - General contractor subcontracting work to company having collective agreement with Labourers union, but not with Carpenters union - Carpenters grieving against general contractor alleging breach of subcontracting clause - Whether Board should defer consideration of grievance to allow filing and resolution of jurisdictional dispute complaint - Whether Board has jurisdiction under section 93 of the Act - Board satisfied that nature of grievance filed and its having been communicated to the subcontractor, constituting a demand for work within the meaning of s.93(1) and that Board having jurisdiction to entertain dispute as jurisdictional dispute

ROBERTSON YATES CORPORATION LIMITED; RE C.J.A., LOCAL UNION 785; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL (Apr.)

507

Construction Industry Grievance - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Work in dispute assigned to Sheet Metal Workers' union, and Plumbers' union filing grievance against employer - Sheet Metal Workers' union then filing jurisdictional dispute complaint against employer - Plumbers' and employer subsequently settling s. 126 application and asking that jurisdictional dispute be dismissed - No remaining work assignment dispute between the two trade unions - Board dismissing complaint and declining Sheet Metal Workers' request to award costs against Plumbers' union

FELIX LOPES SHEET METAL LTD. AND U.A., LOCAL 800; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 504; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP (June)

706

Construction Industry Grievance - Construction Industry - Practice and Procedure - Remedies - Board allowing union's grievance in May 1991 decision and remaining seized on the issue of damages - Subsequent to May 1991 decision, Vice-Chair of panel issuing decision dying -

Employer arguing that Board without jurisdiction to substitute Vice-Chairs and that liability issue would have to be reheard - Board satisfied that it has jurisdiction to continue

OTIS ELEVATOR COMPANY LIMITED; RE I.U.E.C., LOCAL 50..... (Apr.) 497

Construction Industry Grievance - Construction Industry - Remedies - Employer grieving against employee and against union alleging improper claim and receipt of room and board allowance - Employer claiming damages - Nothing in collective agreement giving Board the power to award damages against employee - Board dismissing employer's request for damages, but holding that declaratory relief available - Declaration issuing

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, H.F.I.A., AND H.F.I.A., LOCAL 95 AND JAMES C. CORD (Apr.) 445

Construction Industry Grievance - Construction Industry - Settlement - Labour-Management Relations Committee hearing grievance at Step 3 of grievance procedure and issuing decision - Union submitting that matter in dispute thereby settled pursuant to grievance procedure set out in collective agreement - Board upholding union's preliminary motion, concluding that grievance settled, and directing employer to comply with terms of settlement

E.S. FOX LIMITED; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1007 (Jan.) 29

Construction Industry Grievance - Construction Industry - Union alleging failure to pay wage rate of appropriate classification - Whether time spent on lay-off, while otherwise available for work, to be counted in assessing whether Helper II has completed 36 months "in the industry" within meaning of collective agreement - Board concluding that lay-off periods not to be included in such assessment - Grievance dismissed

OTIS ELEVATOR COMPANY LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50 (Sept.) 1013

Construction Industry Grievance - Construction Industry - Whether attending training course just outside Metro boundaries, as required by employer, entitling grievors to travel allowance under collective agreement - Board rejecting employer's distinction between assigning duties and assigning work - Employees entitled to travel allowance - Grievance allowed

OTIS ELEVATOR CO.; RE I.U.E.C., LOCAL 50 (Jan.) 61

Contempt - Construction Industry - Construction Industry - Contempt - Grievance - Employer failing to attend and bring records to hearing as directed by Board - Board advised that on day of hearing, employer delivering certain records to union office - Board citing employer for contempt and issuing arrest warrant for next day of hearing - Parties to have further opportunity at next day of hearing to address characterization of employer's previous failure to comply with Board's directive and any penalty therefor

CRESTVIEW MASONRY CO. LTD.; RE B.M.I.U., LOCAL 1..... (Oct.) 1068

Crown Transfer - Abandonment - Bargaining Rights - Certification - Whether engaging subcontractor to provide on-site food services amounting to transfer of "undertaking" within meaning of *Crown Transfer Act* - Whether certification applications made by UFCW to represent employees of contractor barred - Whether certification application and application under *Crown Transfer Act* made by OPSEU defeated or barred by subsisting collective agreement between subcontractor and RWDSU - Board finding "transfer" of "part" of Crown's undertaking to subcontractor, but deciding that bargaining rights abandoned by OPSEU - Collective agreement between RWDSU and subcontractor operating as bar to

OPSEU certification application - Certification applications made by UFCW granted - Certification application and crown transfer application made by OPSEU dismissed

PARNELL FOODS LIMITED ("PARNELL"); RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION ("UFCW"); RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION ("O.P.S.E.U.") (Dec.)

1164

Crown Transfer - Bargaining Rights - Whether contract for construction and delivery of crates constituting "transfer of part of undertaking" from Crown to private sector packaging company - Board declining to follow *KBM* case and line of cases propounding "functional" approach to successorship - Board adopting "instrumental" view affirmed by Board in *Metropolitan Parking* case and by Supreme Court of Canada in *Bibeault* case - Board concluding that private sector company using its own undertaking and not acquiring part of Crown's undertaking - Board satisfied that arrangement not constituting "crown transfer" - Application dismissed

MIL-DOM-EX PACKAGING; RE O.P.S.E.U.; RE THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE CENTENNIAL CENTRE OF SCIENCE AND TECHNOLOGY (ONTARIO SCIENCE CENTRE) (Dec.)

1155

Crown Transfer - Ministry of Health revoking licence and taking control of 184 bed nursing home - Ministry operating home for over 3 years - Parties agreeing that home becoming Crown undertaking - Ministry inviting proposals for the 184 beds and subsequently awarding the 184 beds to 3 licensees, including "SV" - "SV" committing itself to receiving a number of residents of nursing home and to considering nursing home staff for employment - Board finding and declaring a transfer of part of an undertaking to "SV" within meaning of *Crown Transfers Act* - Board remaining seized with respect to other relief

SHALOM VILLAGE SOUTH, SAINT ELIZABETH HOME SOCIETY, ONTARIO MINISTRY OF HEALTH AND HAMILTON JEWISH HOME FOR THE AGED CHARITABLE FOUNDATION OPERATING AS; RE S.E.I.U., LOCAL 532 (July)

827

Damages - Construction Industry - Related Employer - Remedies - Board declaring that respondent companies be treated as one employer for purposes of the *Act* and not limiting retrospective effect of the declaration - Board also directing that second respondent pay union the unsatisfied damages, if any, arising out of a damages award made 7 months earlier against first respondent by another panel of the Board in a section 126 proceeding

GOLDEN ARM FLOORING INC., R.R. PROJECTS INC.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27 CJA (June)

731

Damages - Discharge - Health and Safety - Remedies - Complainant claiming damages for mental distress due to unlawful discharge - Medical reports from psychiatrist and family doctor submitted in support of claim - Board awarding \$500 in damages for mental distress - Board also directing employer to pay complainant's dental claim and vacation pay

WHITLER INDUSTRIES LIMITED; RE WADE DENNIS PROCTOR (July)

875

Damages - Remedies - Unfair Labour Practice - Board earlier directing reinstatement of grievor with compensation - Parties unable to resolve matter of compensation - Employer alleging failure to mitigate - Although some area employers had job openings in relevant period and someone in grievor's position could have tried harder to secure employment, Board satisfied that grievor made reasonable efforts to mitigate his losses - Employer directed to fully compensate grievor

PETER GORMAN AND SONS (WHOLESALE) LTD.; RE U.F.C.W., AFL, CIO, CLC (Nov.)

1209

Dependent Contractor - Certification - Board finding drivers working under roof sign of various taxicab brokers to be "dependant contractors"

DIAMOND TAXICAB ASSOCIATION (TORONTO) LIMITED; RE R.W.D.S.U.,
AFL:CIO:CLC(Nov.)

1143

Dependent Contractor - Certification - Certification Where Act Contravened - Construction Industry - Employee - Employer - Discharge - Unfair Labour Practice - Electrical sub-contractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing

GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687(July)

800

Dependent Contractor - Certification - Construction Industry - Employer - Whether certain individuals or entities properly characterized as 'employees' or 'dependent contractors', or as 'independent contractors' - Board finding certain entities not dependent on respondent employer and therefore 'independent contractors' - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the *Act* - Certificates issuing

ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.;
RE CARPENTERS & ALLIED WORKERS LOCAL 27, C.J.A.....(Aug.)

891

Discharge - Adjournment - Health and Safety - Remedies - Witness - Employer seeking adjournment of four continuation hearing dates on the ground that he could not afford to bring witnesses away from work to the hearing and because he had several important meetings to attend to - Board denying adjournment request, employer departing and hearing continuing in absence of employer - On the basis of the evidence before it, Board satisfied that complainant discharged, at least in part, because he gave evidence in an earlier Board proceeding involving his employer and an other employee, in violation of section 50(1) of the *Occupational Health and Safety Act* - Complaint upheld, damages quantified and awarded, and employer directed to post Board's decision in the workplace

WHITLER INDUSTRIES LIMITED; RE ROGER KENNEDY.....(Aug.)

977

Discharge - Certification - Certification Where Act Contravened - Construction Industry - Discharge for Union Activity - Unfair Labour Practice - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing

WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105(Jan.)

101

Discharge - Certification - Certification Where Act Contravened - Construction Industry - Employee - Employer - Dependent Contractor - Unfair Labour Practice - Electrical sub-contractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing

GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687(July)

800

Discharge - Certification - Certification Where Act Contravened - Discharge for Union Activity - Unfair Labour Practice - Remedies - Discharges not motivated solely by legitimate business reasons - Reinstatement appropriate even where there is successor employer - Board issuing certificate pursuant to section 8 of the Act	
BEAVER LUMBER, WENTWORTH BEAVER LIMITED C.O.B. AS; RE R.W.D.S.U., AFL:CIO:CLC	(May) 553
Discharge - Certification - Certification Where Act Contravened - Practice and Procedure - Unfair Labour Practice - Failure to secure employees' written authorization not precluding union from claiming relief on behalf of those employees - Board finding employee's suspension, certain demotions and lay-offs motivated by anti-union animus - Employer harassment and warning letter directing in-plant organizer to cease collecting cards on company property, in circumstances, violating the Act - Various employer statements at employee meetings also violating the Act - Board issuing certificate pursuant to section 8 of the Act	
ROYAL HOMES LIMITED; RE C.J.A., LOCAL 27; RE GROUP OF EMPLOYEES; RE C.J.A., LOCAL 3054.....	(Feb.) 199
Discharge - Certification - Discharge for Union Activity - Membership Evidence - Petition - Unfair Labour Practice - Board not satisfied that employer's reasons for employee's lay-off entirely free of improper motivation - Board not satisfied that petitions representing voluntary expressions of employee wishes - Board re-affirming that it does not treat revocation, resignation or withdrawal of membership as cancelling or invalidating membership card for purposes of Board's assessment under section 7 of the Act - Allegation that union refused to return petitioner's card, even if true, not creating defect in the membership evidence - Certificate issuing	
HAVLIK TECHNOLOGIES INC., (WILLIAMS MACHINES DIVISION); RE C.A.W.; RE GROUP OF EMPLOYEES	(Apr.) 468
Discharge - Damages - Health and Safety - Remedies - Complainant claiming damages for mental distress due to unlawful discharge - Medical reports from psychiatrist and family doctor submitted in support of claim - Board awarding \$500 in damages for mental distress - Board also directing employer to pay complainant's dental claim and vacation pay	
WHITLER INDUSTRIES LIMITED; RE WADE DENNIS PROCTOR.....	(July) 875
Discharge - Discharge for Union Activity - Unfair Labour Practice - Board not satisfied that employer's reasons for discharging grievor entirely free of improper motive - Evidence indicating that legitimate reasons co-existing with unlawful reasons - Complaint allowed - Reinstatement with compensation ordered	
KAUTEX OF CANADA INC.; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW - CANADA).....	(Nov.) 1197
Discharge - Duty of Fair Representation - Evidence - Practice and Procedure - Unfair Labour Practice - Board declining to hear evidence of Labour Relations Officer's settlement endeavours - Employee hired on call-in basis subsequently discharged - Local union president having only brief and casual conversation with complainant after her discharge - Local president failing to respond to complainant's letter or to any of numerous telephone calls - Union demonstrating "not caring" attitude - Fair representation complaint upheld	
CRAIG, TANYA; RE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 203, AND CONSUMERS GLASS	(Jan.) 16
Discharge - Duty of Fair Representation - Remedies - Unfair Labour Practice - Union acknowledging that it violated its duty of fair representation in relation to the complainant's discharge grievance - Parties agreeing that grievance be submitted for arbitration and that	

Board remained seized on issue of union's liability for damages which may be awarded - Board directing that union and complainant jointly select counsel and that company, union and complainant mutually agree upon single arbitrator - Board declining to give complainant sole carriage with respect to arbitration

BRUCE REILLY; RE THE U.S.W.A.; RE GSW INC..... (July) 820

Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... (Mar.) 408

Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... (Sept.) 1058

Discharge - Health and Safety - Deputy fire chief of volunteer fire department alleging that he was removed from his position for acting in compliance with, and seeking enforcement of, *Occupational Health and Safety Act* - Board determining that town council not motivated by anti-safety animus - Complaint dismissed

TOWNSHIP OF MATCHEDASH COUNCIL, THE; RE RONALD GERALD TISLER (Jan.) 87

Discharge - Intimidation and Coercion - Judicial Review - Unfair Labour Practice - Board finding employer in violation of the *Act* in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer applying for judicial review of Board's decision and seeking interim relief - Divisional Court staying Board's decision

SOBEYS INC.; RE UFCW, LOCAL 1000A..... (Dec.) 1237

Discharge - Intimidation and Coercion - Unfair Labour Practice - Board finding employer in violation of the *Act* in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations

SOBEYS INC.; RE U.F.C.W., LOCAL 1000A..... (Sept.) 1020

Discharge for Union Activity - Certification - Certification Where Act Contravened - Construction Industry - Discharge - Unfair Labour Practice - Employer motivated by anti-union animus in discharging one employee and provoking second employee into quitting - Union demonstrating adequate support for collective bargaining, but true wishes of employees not likely to be ascertained in representation vote - Certificates issuing	
WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105(Jan.)	101
Discharge for Union Activity - Certification - Certification Where Act Contravened - Discharge - Unfair Labour Practice - Remedies - Discharges not motivated solely by legitimate business reasons - Reinstatement appropriate even where there is successor employer - Board issuing certificate pursuant to section 8 of the <i>Act</i>	
BEAVER LUMBER, WENTWORTH BEAVER LIMITED C.O.B. AS; RE R.W.D.S.U., AFL:CIO:CLC (May)	553
Discharge for Union Activity - Certification - Discharge - Membership Evidence - Petition - Unfair Labour Practice - Board not satisfied that employer's reasons for employee's lay-off entirely free of improper motivation - Board not satisfied that petitions representing voluntary expressions of employee wishes - Board re-affirming that it does not treat revocation, resignation or withdrawal of membership as cancelling or invalidating membership card for purposes of Board's assessment under section 7 of the <i>Act</i> - Allegation that union refused to return petitioner's card, even if true, not creating defect in the membership evidence - Certificate issuing	
HAVLIK TECHNOLOGIES INC., (WILLIAMS MACHINES DIVISION); RE C.A.W.; RE GROUP OF EMPLOYEES (Apr.)	468
Discharge for Union Activity - Discharge - Unfair Labour Practice - Board not satisfied that employer's reasons for discharging grievor entirely free of improper motive - Evidence indicating that legitimate reasons co-existing with unlawful reasons - Complaint allowed - Reinstatement with compensation ordered	
KAUTEX OF CANADA INC.; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW - CANADA)(Nov.)	1197
Duty of Fair Referral - Duty of Fair Representation - Unfair Labour Practice - Remedies - Complainant alleging that union violated the <i>Act</i> in removing him from his position in March 1991 and in the processes followed by the union thereafter - Union conceding that complainant had right to take his case concerning his removal to general membership for final decision - Board determining that union acted in arbitrary manner in refusing to allow complainant to present his request to remain in his position to membership for a vote - Board directing union to allow complainant to place his case before membership for its decision - Union also directed to notify all members in advance that the issue is to go before membership, to post Board's decision in the union's office and to provide copies to those members requesting it	
PETER GALIATSOS; RE I.A.T.S.E., LOCAL 173; RE FAMOUS PLAYERS INC. (June)	714
Duty of Fair Representation - Adjournment - Unfair Labour Practice - Complainants alleging that process leading to Pay Equity Plan with employer unfair and biased against certain employees in computing and technical classifications - Board denying union's motion to dis-	

miss complaint for failure to plead *prima facie* case - Board also dismissing complainants' motion to adjourn pending disposition of related court proceeding

JOHN HUNTLEY, PEGGY NG, ROD POTTER, MAJELLA POWER-O'CONNOR, LANCE RANKIN, ERIKS RUGELIS, JAMIE SPENCE, VERONICA TIMM, CARLOS M. MARQUES, JOHN G. CURRELL, TONY D'AGOSTINO AND DAVIE COLLIER-BROWN; RE THE YORK UNIVERSITY STAFF ASSOCIATION(Nov.)

1193

Duty of Fair Representation - Collective Agreement - Construction Industry - Unfair Labour Practice - Employer and employee bargaining agencies for "electrical-trade" portion of ICI sector of construction industry settling renewal of collective agreement expiring April 30, 1992 - Settlement made on February 14, 1992 also amending existing ICI agreement ten weeks prior to its April 30th expiry date - Whether the two e.b.a.'s without jurisdiction to amend existing provincial agreement - Whether employer bargaining agency breaching duty of fair representation - Whether whole settlement should be set aside - Complaint brought by Sarnia contractors dismissed

ELECTRICAL CONTRACTORS ASSOCIATION OF SARNIA; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO, I.B.E.W., AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO(Apr.)

435

Duty of Fair Representation - Discharge - Evidence - Practice and Procedure - Unfair Labour Practice - Board declining to hear evidence of Labour Relations Officer's settlement endeavours - Employee hired on call-in basis subsequently discharged - Local union president having only brief and casual conversation with complainant after her discharge - Local president failing to respond to complainant's letter or to any of numerous telephone calls - Union demonstrating "not caring" attitude - Fair representation complaint upheld

CRAIG, TANYA; RE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 203, AND CONSUMERS GLASS(Jan.)

16

Duty of Fair Representation - Discharge - Remedies - Unfair Labour Practice - Union acknowledging that it violated its duty of fair representation in relation to the complainant's discharge grievance - Parties agreeing that grievance be submitted for arbitration and that Board remained seized on issue of union's liability for damages which may be awarded - Board directing that union and complainant jointly select counsel and that company, union and complainant mutually agree upon single arbitrator - Board declining to give complainant sole carriage with respect to arbitration

BRUCE REILLY; RE THE U.S.W.A.; RE GSW INC.....(July)

820

Duty of Fair Representation - Duty of Fair Referral - Unfair Labour Practice - Remedies - Complainant alleging that union violated the *Act* in removing him from his position in March 1991 and in the processes followed by the union thereafter - Union conceding that complainant had right to take his case concerning his removal to general membership for final decision - Board determining that union acted in arbitrary manner in refusing to allow complainant to present his request to remain in his position to membership for a vote - Board directing union to allow complainant to place his case before membership for its decision - Union also directed to notify all members in advance that the issue is to go before membership, to post Board's decision in the union's office and to provide copies to those members requesting it

PETER GALIATSOS; RE I.A.T.S.E., LOCAL 173; RE FAMOUS PLAYERS INC.(June)

714

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Union filing lengthy reply to employee's complaint and asking that it be dismissed without a hearing on

a number of grounds - Complainant directed to respond to union's reply and to address certain concerns raised in complaint within 30 days

EUGENE DESEIRE SOLOMON; RE R.W.D.S.U..... (May) 639

Duty of Fair Representation - Unfair Labour Practice - Union grieving permanent lay-off of 52 employees - Some employees signing release in order to receive immediate severance pay and, consequently, withdrawing their claims under grievance procedure - Union subsequently settling grievance, securing monetary compensation on top of severance pay - Whether union violated *Act* when it failed to tell employees before they signed releases that a few days later there would or might be a settlement giving remaining grievors more monetary compensation - Complaint dismissed

FORMER RNA'S OF MOUNT SINAI HOSPITAL, THE; RE S.E.I.U.,
LOCAL 204 (June) 708

Duty to Bargain in Good Faith - Bargaining Unit - Remedies - Unfair Labour Practice - Voluntary Recognition - Employer seeking recognition clause different from one found in voluntary recognition agreement - Board finding that parties had bargained to impasse and that employer's insistence on pressing its position on bargaining unit constituting bargaining in bad faith - Board making cease and desist direction, but declining to order payment of damages

WELLINGTON COUNTY SEPARATE SCHOOL BOARD, THE; RE WELLINGTON
SEPARATE SUPPORT STAFF ASSOCIATION (Oct.) 1128

Duty to Bargain in Good Faith - Construction Industry - Unfair Labour Practice - Whether union breaching the duty to bargain by insisting that there be one collective agreement and one seniority list for construction work and non-construction work in the elevator industry in the province, and by refusing Association's request that union sign the same non-ICI agreement it had signed with some individual employers - Whether subsequent collective agreement removing grounds for the complaint proceeding - Complaint dismissed

NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION; RE I.U.E.C.,
LOCALS 50, 90 AND 96 (Mar.) 345

Duty to Bargain in Good Faith - Lock-Out - Remedies - Unfair Labour Practice - Employer agreeing to voluntarily recognize union at new location so long as union prepared to enter into separate collective agreement for that location - Union rejecting employer position and filing complaint at Board - Board finding and declaring that existing collective agreement encompassing new location and that staffing and subsequent operation of new location governed by collective agreement - Board directing that any continuing dispute regarding application of agreement be determined through arbitration and directing parties to waive time limits - Board also finding that employer breached its duty to bargain in good faith in preceding round of negotiations by passing on incomplete and misleading information regarding relocation of employer operations

UNION CARBIDE CANADA LIMITED; RE ENERGY AND CHEMICAL WORKERS UNION, LOCAL 593..... (May) 645

Employee - Bargaining Unit - Certification - Pre-Hearing Vote - Employer taking position in reply to union's certification application that bargaining unit should include second location within municipality - Union claiming that employees not sharing community of interest - Union also seeking to reserve its right, pending further investigation following pre-hearing vote, to challenge managerial or employee status of employees at second location - Absent appropriate challenges being made up to and including the time of the actual taking of the

vote, Board seeing no basis for directing segregation of all ballots - Board finding no basis for allowing union to reserve any right to make challenges following the taking of the vote

POLYTARP PRODUCTS, ALROS PRODUCTS LIMITED C.O.B. AS;
RE U.S.W.A. (Apr.) 502

Employee - Certification - Certification Where Act Contravened - Construction Industry - Employer - Dependent Contractor - Discharge - Unfair Labour Practice - Electrical sub-contractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing

GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687 (July) 800

Employee - Certification - Construction Industry - Evidence - Practice and Procedure - Board satisfied that certain documents properly admitted as exhibits by Officer conducting examination in the exercise of his discretion - *E. & E. Seegmiller* case explained - Onus of proof regarding employee list issues lying with party seeking to exclude the person whose status is in question, except where it would have to prove a negative in order to succeed

CAMARO ENTERPRISES LIMITED C.O.B. AS MUL DAR CONSTRUCTION AND
C.O.B. AS PARK TRUCKING, WALTER AMBROZIK, ERWIN MOWATSKI, ANNE
MOWATSKI; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES (Apr.) 423

Employee Reference - Practice and Procedure - Employer submitting that inquiry authorized by the Board ought not to proceed until the union provides additional information specified in earlier Board decision - Board noting applicability of Practice Note #4 to this situation and ruling that the Officer will determine whether or not the union has complied sufficiently with the Board's direction to permit inquiry to proceed

J.M. SCHNEIDER INC.; RE SCHNEIDER OFFICE EMPLOYEES'
ASSOCIATION (Feb.) 186

Employer - Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Board determining that Carpenters' union had not abandoned its bargaining rights in the ICI sector prior to March 1978 - Board adopting and applying *Metro Toronto* #2 case and rejecting argument that respondent was acting in capacity of owner and purchaser of construction services and not as employer in the construction industry

SHELL CANADA LIMITED; RE C.J.A., LOCAL 1988 (Nov.) 1231

Employer - Certification - Certification Where Act Contravened - Construction Industry - Employee - Dependent Contractor - Discharge - Unfair Labour Practice - Electrical sub-contractor going bankrupt and its employees continuing to work on project - Union filing certification application and electricians subsequently laid off - Whether electricians engaged as independent contractors - Whether engaged by project superintendent or by general contractor - Whether lay-offs improperly motivated - Board finding electricians to be dependent contractors engaged by general contractor and that subsequent lay-offs unrelated to certification application - Certificates issuing

GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687 (July) 800

Employer - Certification - Construction Industry - Dependent Contractor - Whether certain individuals or entities properly characterized as 'employees' or 'dependent contractors', or as 'independent contractors' - Board finding certain entities not dependent on respondent employer and therefore 'independent contractors' - Carpentry business run by 2 partners and employing one helper - Whether, by using helper, partners of carpentry business

engaging in entrepreneurial activity, such that they are independent contractors - Board finding partners and employee of carpentry business sufficiently dependent on respondent employer as to make it their employer the purposes of the *Act* - Certificates issuing

ALPA WOOD MOULDINGS COMPANY, A DIVISION OF ALPA LUMBER INC.;
RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA.....(Aug.)

891

Employer - Certification - Construction Industry - Evidence - Practice and Procedure - Unfair Labour Practice - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing - Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date

GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN
BAND; RE L.I.U.N.A., LOCAL 607 (Feb.)

174

Employer - Certification - Related Employer - First respondent operating theatre complex under agreement with complex owner - Other respondents, amongst others, using complex under licence for producing or presenting theatrical productions - Respondents under common control or direction - Respondents asserting that they carry on businesses separately but in a related enterprise - Common employer declaration issuing - Board, however, finding the "producer" rather than "the house" to be the employer of the stagehands dispatched from the union's hiring hall - Board determining that for purposes of "the count" in this industry, the employee complement is that which exists on the application date - As there were no employees of the named respondents at work in the bargaining unit at the time the application was made, certification application dismissed

THEATRECORP LTD., AND WGC FACILITY MANAGEMENT CORPORATION
AND THEATREMART LTD.; RE I.A.T.S.E., LOCAL 58, TORONTO.....(Mar.)

388

Employer Support - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (July)

885

Employer Support - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Judicial Review - Stay - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for stay of Board decision pending

judicial review - Stay application dismissed by Divisional Court for failing to establish strong *prima facie* case

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (June) 764

Employer support - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed

ELLIS-DON LIMITED; RE I.B.E.W., LOCAL 894..... (Feb.) 147

Employer Support - Certification - Change in Working Conditions - Collective Agreement - Construction Industry - Timeliness - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the *Act* - Certification application dismissed as being untimely

STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C. (Sept.) 1049

Employer Support - Certification - Trade Union Status - Board satisfied that employer participated in formation and administration of applicant union and contributed support to it - Section 13 of the *Act* operating to bar certification - Certification application dismissed

AIRLIFT LIMOUSINE SERVICES LIMITED; RE THE CANADIAN ALLIANCE OF AIRPORT TRANSPORTATION WORKERS; RE TEAMSTERS' UNION, LOCAL UNION 938 (Sept.) 985

Employer Support - Collective Agreement - Construction Industry - Related Employer - Remedies - Voluntary Recognition - Board rejecting respondent's submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union's low-rise residential agreement

WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353..... (Feb.) 262

Evidence - Adjournment - Certification - Construction Industry - Construction Industry Grievance - Practice and Procedure - Related Employer - Board permitting employer to use tape-recorder but not hand-held video camera to record proceedings - Board denying request for adjournment so that ruling on video camera might be appealed - Board directing all parties to set out all facts and to list and produce all documents upon which they intend to rely prior to next hearing date - Board commenting on standards of decorum to which parties appearing before the Board must adhere

BEMAR CONSTRUCTION (ONTARIO) INC.; RE I.B.E.W., LOCAL 353 (May) 565

Evidence - Adjournment - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Board declining to allow respondent union to make preliminary objection where it had not been included in the union's pre-hearing brief in accordance with Practice Note #15 - Board not allowing respondent union to lead evidence with respect to area practice where union neglected to include job or project lists in its pre-hearing brief - Board allowing evidence of employer practice throughout the province (and not exclusively in Board Area 3) - Having regard to parties consenting to adjourn 12 of 13 days set by Board for hearing, Board declining to set further hearing dates unless request received within 1 month - Board indicating that there will be no consultation with the parties with respect to available dates

ELLIS-DON LIMITED AND O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059 AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL..... (June)

695

Evidence - Bargaining Unit - Certification - Membership Evidence - Petition - Objecting employees delivering petition to Office of Official Examiner in Ottawa - Petition not filed with Board prior to terminal date - Board declining to extend terminal date - Board accepting photocopied membership evidence where originals lost through no fault of union - Bargaining rights restricted to employer's Airline Services Division - Certificate issuing

CARA OPERATIONS LIMITED; RE HOTEL, CLUBS, RESTAURANTS, TAVERNS EMPLOYEES UNION, LOCAL 261; RE GROUP OF EMPLOYEES..... (Feb.)

131

Evidence - Certification - Charges - Membership Evidence - Witness - Witness in non-pay inquiry testifying that she paid \$1 when applying for union membership - Witness acknowledging in cross-examination that she had made previous inconsistent statements - Board declining to accept witness' prior inconsistent statements as evidence of the truth of their contents - Board having no affirmative evidence that witness did not pay a dollar in regard to her application - Non-pay allegation dismissed

CAMARO ENTERPRISES LIMITED; RE IUOE, LOCAL 793; RE GROUP OF EMPLOYEES..... (July)

772

Evidence - Certification - Charges - Representation Vote - Four employees who had not been on voters' list casting ballots - Employees arguing that they properly belong in bargaining unit and that their ballots should be counted - Board ruling that their segregated ballots not be counted and that it would not inquire further into their duties and responsibilities - Board permitting union to call evidence of handwriting expert as part of defence to forgery allegation in non-pay/non-sign inquiry - Board determining that card submitted by union reliable - Board commenting on procedure where non-pay/non-sign allegations raised subsequent to representation vote - Certificate issuing

MOORE CORPORATION LIMITED; RE GRAPHIC COMMUNICATION INTERNATIONAL UNION, LOCAL N-1; RE GROUP OF EMPLOYEES..... (May)

614

Evidence - Certification - Construction Industry - Employee - Practice and Procedure - Board satisfied that certain documents properly admitted as exhibits by Officer conducting examination in the exercise of his discretion - *E. & E. Seegmiller* case explained - Onus of proof regarding employee list issues lying with party seeking to exclude the person whose status is in question, except where it would have to prove a negative in order to succeed

CAMARO ENTERPRISES LIMITED C.O.B. AS MUL DAR CONSTRUCTION AND C.O.B. AS PARK TRUCKING, WALTER AMBROZIK, ERWIN MOWATSKI, ANNE MOWATSKI; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES..... (Apr.)

423

Evidence - Certification - Construction Industry - Employer - Practice and Procedure - Unfair Labour Practice - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing -

Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date

GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN BAND; RE L.I.U.N.A., LOCAL 607 (Feb.) 174

Evidence - Charges - Intimidation and Coercion - Judicial Review - Representation Vote - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking judicial review on grounds that Board answered wrong question, applied wrong legal test and made unreasonable findings of fact - Application for judicial review dismissed by Divisional Court

POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB (June) 766

Evidence - Charges - Intimidation and Coercion - Judicial Review - Representation Vote - Stay - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking stay of union's certification pending hearing of judicial review application by Divisional Court - Stay application dismissed on consent

POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB (May) 662

Evidence - Charges - Intimidation and Coercion - Representation Vote - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert evidence on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that conduct of union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing

POLYTECH COATINGS LIMITED; RE C.A.W.; RE GROUP OF EMPLOYEES (Mar.) 362

Evidence - Construction Industry - Construction Industry Grievance - Practice and Procedure - Sector Determination - Parties disputing scope of work and scope of evidence relevant to sector determination - Board deciding that parties free to rely on industry practice throughout the province in regards to employee relations on the type of work in dispute - Subject of sector determination identified as work related to installation of large underground concrete storage tanks associated with water treatment purposes

MATTHEWS CONTRACTING INC.; RE C.J.A., LOCAL 18; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL (Oct.) 1088

Evidence - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Ironworkers' union and Plumbers' union disputing assignment of signalling, rigging and other work - Board rejecting argument that complaint should not be heard because matter had been referred to The Plan for Settlement of Jurisdictional Disputes in the Construction Industry - Board finding that trade agreement with respect to work jurisdiction can be revoked or

repudiated by one party to the agreement upon the giving of reasonable notice - Board holding that Cooper-Connolly agreement neither an 'international trade agreement', nor a 'local agreement' binding on the locals to this dispute - Board observing that it is the rare and unusual jurisdictional dispute complaint in which the Board does not attach primary weight to area and employer past practice - Board directing assignment of disputed work

EPSCA, ONTARIO HYDRO, U.A., LOCAL 46; RE B.S.O.I.W., LOCAL 721(Aug.)

915

Evidence - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Parties requesting that Board decide, as preliminary matter, scope of relevant past practice evidence with respect to disputed work - Board ruling that evidence should be restricted to ICI sector and to precast concrete ducts (as opposed to all conduit duct banks)

ADAM CLARK COMPANY LTD., I.B.E.W., LOCAL 350 AND; RE L.I.U.N.A., LOCAL 1089.....(Jan.)

6

Evidence - Discharge - Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Board declining to hear evidence of Labour Relations Officer's settlement endeavours - Employee hired on call-in basis subsequently discharged - Local union president having only brief and casual conversation with complainant after her discharge - Local president failing to respond to complainant's letter or to any of numerous telephone calls - Union demonstrating "not caring" attitude - Fair representation complaint upheld

CRAIG, TANYA; RE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 203, AND CONSUMERS GLASS(Jan.)

16

Evidence - Discharge - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI.....(Mar.)

408

Evidence - Discharge - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... (Sept.)

1058

Evidence - First Contract Arbitration - Board applying *Great Lakes Community Credit Union* case and declining to hear evidence of amended negotiating position made after application date - Board satisfied that employer's bargaining positions with respect to union security and foremen doing bargaining unit work taken without reasonable justification - Board also satisfied that refusal to recognize the bargaining authority of the trade union underlying employer's position in bargaining - Board directing arbitration of first collective agreement

ROMATT CUSTOM WOODWORK INC.; RE C.J.A., LOCAL 27(Mar.)

377

Evidence - Practice and Procedure - Sale of a Business - Witness - Board not persuaded that statutory duty under sub-section 64(13) satisfied through production by only one of the respondents of a witness to testify with respect to the allegation that a sale occurred - Second respondent directed to adduce, through *viva voce* testimony at the hearing, "all facts within their knowledge that are material to the allegation"

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS' UNION, LOCAL 419; RE R.W.D.S.U., AFL CIO CLC AND ITS LOCAL 414..... (Feb.)

223

First Contract Arbitration - Adjournment - *Hospital Labour Disputes Arbitration Act* - Practice and Procedure - Subsequent to union's application for direction of first contract by arbitration, union applying under *HLDA* for arbitration of dispute - Employer taking position that it is not a "hospital" within meaning of *HLDA* - Minister of Labour, as of date of Board proceeding, not having determined whether or not employer a "hospital" - Board rejecting argument that union's application under *HLDA* warranting dismissal of first contract application for abuse of process - Board adjourning first contract application pending Minister's decision

SUREX COMMUNITY SERVICES; RE C.U.P.E. (May)

642

First Contract Arbitration - Adjournment - Practice and Procedure - Employer seeking adjournment on grounds that its counsel had been its spokesperson in negotiations and anticipated being in position of both witness and counsel at the Board hearing - Adjournment request denied - Board finding that employer's positions on monetary issues, its attempts to limit opportunity for arbitral review of employer decisions and to undermine just cause protection and recognition of seniority representing underlying refusal to recognize union's bargaining authority - Various employer proposals, including two-tier wage proposal taken without reasonable justification - Employer failing to make reasonable or expeditious efforts to conclude collective agreement - Board directing first contract arbitration

BOYS' HOME, THE; RE C.U.P.E. AND ITS LOCAL 3501..... (Apr.)

409

First Contract Arbitration - Board making award on items in dispute, including wages, signing bonus, banquet gratuities and term of agreement

HOLIDAY INN, OWEN SOUND, 888538 LIMITED OA; RE U.F.C.W., LOCAL 175 (May)

580

First Contract Arbitration - Despite exhaustive negotiations and prolonged strike, parties unable to arrive at a collective agreement - Board determining that parties unable to disentangle themselves from pressures, limitations and agendas not derived from collective bargaining process itself - In the circumstances, logjam warranting Board's intervention - Board directing first contract arbitration under section 41(2)(d)

CAMBRIDGE REPORTER, THE, A DIVISION OF CANADIAN NEWSPAPERS COMPANY LIMITED; RE SOUTHERN ONTARIO NEWSPAPER GUILD, LOCAL 87..... (Mar.)

271

First Contract Arbitration - Evidence - Board applying *Great Lakes Community Credit Union* case and declining to hear evidence of amended negotiating position made after application date - Board satisfied that employer's bargaining positions with respect to union security and foremen doing bargaining unit work taken without reasonable justification - Board also satisfied that refusal to recognize the bargaining authority of the trade union underlying employer's position in bargaining - Board directing arbitration of first collective agreement

ROMATT CUSTOM WOODWORK INC.; RE C.J.A., LOCAL 27 (Mar.)

377

Fraud - Charges - Reconsideration - Termination - Employee alleging that union obtained its certificate by fraud and that bargaining rights should be terminated - Board determining that

certain allegations not contributing to *prima facie* case - Other allegations dismissed on basis of lack of particularity and delay - Reconsideration application and termination application dismissed

CAMBRIDGE REPORTER; RE DIRK KOEHLER, FOR THE EMPLOYEES OF THE CAMBRIDGE REPORTER; RE THE SOUTHERN ONTARIO NEWSPAPER GUILD UNIT, CAMBRIDGE, ONT. (LOCAL 87)..... (Oct.)

1059

Health and Safety - Adjournment - Discharge - Remedies - Witness - Employer seeking adjournment of four continuation hearing dates on the ground that he could not afford to bring witnesses away from work to the hearing and because he had several important meetings to attend to - Board denying adjournment request, employer departing and hearing continuing in absence of employer - On the basis of the evidence before it, Board satisfied that complainant discharged, at least in part, because he gave evidence in an earlier Board proceeding involving his employer and an other employee, in violation of section 50(1) of the *Occupational Health and Safety Act* - Complaint upheld, damages quantified and awarded, and employer directed to post Board's decision in the workplace

WHITLER INDUSTRIES LIMITED; RE ROGER KENNEDY.....(Aug.)

977

Health and Safety - Adjournment - Practice and Procedure - Complainant's counsel writing to Board on the day before hearing seeking adjournment on the ground that he was not ready to proceed - Neither complainant nor his counsel appearing at hearing - Board not satisfied that adjournment justified for several reasons, including fact that request not made in a timely manner - Complaint dismissed

AB COX PONTIAC BUICK GMC LTD.; RE LEONARD PERRY..... (June)

665

Health and Safety - Damages - Discharge - Remedies - Complainant claiming damages for mental distress due to unlawful discharge - Medical reports from psychiatrist and family doctor submitted in support of claim - Board awarding \$500 in damages for mental distress - Board also directing employer to pay complainant's dental claim and vacation pay

WHITLER INDUSTRIES LIMITED; RE WADE DENNIS PROCTOR.....(July)

875

Health and Safety - Discharge - Deputy fire chief of volunteer fire department alleging that he was removed from his position for acting in compliance with, and seeking enforcement of, *Occupational Health and Safety Act* - Board determining that town council not motivated by anti-safety animus - Complaint dismissed

TOWNSHIP OF MATCHEDASH COUNCIL, THE; RE RONALD GERALD

TISLER.....(Jan.)

87

Health and Safety - Discharge - Evidence - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI.....(Mar.)

408

Health and Safety - Discharge - Evidence - Judicial Review - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed -

Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... (Sept.) 1058

Health and Safety - Judicial Review - Employee citing second-hand tobacco smoke in work refusal - Board finding health and safety not real reason for refusal and that employer discipline not unlawful in circumstances - Complaint dismissed - Employee seeking judicial review on ground that Board members' conduct gave rise to reasonable apprehension of bias - Employee issuing summons to witness to Board member to secure evidence for use in judicial review application - Court concluding that summons an abuse of process and quashing it

BOEING CANADA/DEHAVILLAND DIVISION AND SUSAN A. TACON, JOHN A. RONSON AND DAVID A. PATTERSON AND O.L.R.B., RE JILL BETTES (Oct.) 1136

Hospital Labour Disputes Arbitration Act - Certification - Interest Arbitration - Pre-Hearing Vote - Timeliness - Interest arbitration award on 'central issues' issued in December 1991 - Award establishing term of collective agreement to be from April 1, 1990 to March 31, 1992 - Rival union making displacement certification application in February 1992 - 'Local issues' arbitration award still outstanding and collective agreement for 1990-92 period not yet made - Board finding displacement application timely under HLDAA as falling within 60 days preceding March 31, 1992 or, alternatively, within 90 days after 'central issues' award - Board directing that ballots cast in pre-hearing vote be counted

CHATEAU GARDENS QUEENS, MERCEDES CORPORATION C.O.B. AS; RE C.L.A.C.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220(Aug.) 906

Hospital Labour Disputes Arbitration Act - Change in Working Conditions - Unfair Labour Practice - Board determining that employer's failure to pay "interval" wage increases during 1990 and 1991 violating the statutory "freeze" - Union's delay in making complaint, in the circumstances, not standing in the way of a Board finding and remedial order - Complaint upheld - Employer directed to implement the wage increase for 1990 and 1991 according to its established practice

HARROWOOD SENIORS' COMMUNITY; RE C.U.P.E., LOCAL 3419..... (Feb.) 177

Interest Arbitration - Certification - *Hospital Labour Disputes Arbitration Act* - Pre-Hearing Vote - Timeliness - Interest arbitration award on 'central issues' issued in December 1991 - Award establishing term of collective agreement to be from April 1, 1990 to March 31, 1992 - Rival union making displacement certification application in February 1992 - 'Local issues' arbitration award still outstanding and collective agreement for 1990-92 period not yet made - Board finding displacement application timely under HLDAA as falling within 60 days preceding March 31, 1992 or, alternatively, within 90 days after 'central issues' award - Board directing that ballots cast in pre-hearing vote be counted

CHATEAU GARDENS QUEENS, MERCEDES CORPORATION C.O.B. AS; RE C.L.A.C.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220(Aug.) 906

Intimidation and Coercion - Certification - Charges - Petition - Board finding reaffirmation document submitted by union representing voluntary wishes of those signing it - Objectors' charges of union misconduct not established on the evidence - Board declining to draw inference of intimidation from fact that employees of Vietnamese origin overwhelmingly

supported union and resisted objectors' efforts to persuade them to contrary view - Certificate issuing	
RIVERSIDE FABRICATING LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES.....(Aug.)	958
Intimidation and Coercion - Charges - Evidence - Judicial Review - Representation Vote - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking judicial review on grounds that Board answered wrong question, applied wrong legal test and made unreasonable findings of fact - Application for judicial review dismissed by Divisional Court	
POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB..... (June)	766
Intimidation and Coercion - Charges - Evidence - Judicial Review - Representation Vote - Stay - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking stay of union's certification pending hearing of judicial review application by Divisional Court - Stay application dismissed on consent	
POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB..... (May)	662
Intimidation and Coercion - Charges - Evidence - Representation Vote - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert evidence on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that conduct of union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing	
POLYTECH COATINGS LIMITED; RE C.A.W.; RE GROUP OF EMPLOYEES.....(Mar.)	362
Intimidation and Coercion - Discharge - Judicial Review - Unfair Labour Practice - Board finding employer in violation of the <i>Act</i> in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer applying for judicial review of Board's decision and seeking interim relief - Divisional Court staying Board's decision	
SOBEYS INC.; RE UFCW, LOCAL 1000A..... (Dec.)	1237
Intimidation and Coercion - Discharge - Unfair Labour Practice - Board finding employer in violation of the <i>Act</i> in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about	

unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations

SOBEYS INC.; RE U.F.C.W., LOCAL 1000A (Sept.) 1020

Judicial Review - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (July) 885

Judicial Review - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Stay - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for stay of Board decision pending judicial review - Stay application dismissed by Divisional Court for failing to establish strong *prima facie* case

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (June) 764

Judicial Review - Adjournment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Board denying request for adjournment pending disposition of judicial review application in different proceeding - Union asserting that issue of whether employer bound by provincial ICI agreement *res judicata* as a result of earlier *Ellis-Don* decision - Board finding all necessary elements of issue estoppel branch of doctrine of *res judicata* present - No cogent reason not to apply earlier *Ellis-Don* decision to current applications - Employer precluded from contesting union's assertion that it is bound by provincial agreement

ELLIS-DON LIMITED; RE I.B.E.W. LOCAL 105 (Sept.) 999

Judicial Review - Charges - Evidence - Intimidation and Coercion - Representation Vote - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking judicial review on grounds that Board answered

- wrong question, applied wrong legal test and made unreasonable findings of fact - Application for judicial review dismissed by Divisional Court
- POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB..... (June) 766
- Judicial Review - Charges - Evidence - Intimidation and Coercion - Representation Vote - Stay - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking stay of union's certification pending hearing of judicial review application by Divisional Court - Stay application dismissed on consent
- POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB..... (May) 662
- Judicial Review - Constitutional Law - Construction Industry - Charter of Rights - Union Successor Status - Two locals of same union merged - Officers and members of one local opposed - Merger in compliance with union constitution - Constitution not requiring membership approval - Board issuing declaration of successor status - Divisional Court upholding Board decision - Failure to hold vote not infringing Charter right to freedom of association - Board operated within limits of statutory discretion in making successor declaration - Leave to appeal from order of Divisional Court denied by Court of Appeal
- I.B.E.W., LOCAL 586 AND THE OLRB; RE I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH (July) 889
- Judicial Review - Discharge - Evidence - Health and Safety - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness beached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court
- NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... (Mar.) 408
- Judicial Review - Discharge - Evidence - Health and Safety - Natural Justice - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal
- NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... (Sept.) 1058
- Judicial Review - Discharge - Intimidation and Coercion - Unfair Labour Practice - Board finding employer in violation of the *Act* in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations -

Employer applying for judicial review of Board's decision and seeking interim relief - Divisional Court staying Board's decision

SOBEYS INC.; RE UFCW, LOCAL 1000A..... (Dec.) 1237

Judicial Review - Health and Safety - Employee citing second-hand tobacco smoke in work refusal - Board finding health and safety not real reason for refusal and that employer discipline not unlawful in circumstances - Complaint dismissed - Employee seeking judicial review on ground that Board members' conduct gave rise to reasonable apprehension of bias - Employee issuing summons to witness to Board member to secure evidence for use in judicial review application - Court concluding that summons an abuse of process and quashing it

BOEING CANADA/DEHAVILLAND DIVISION AND SUSAN A. TACON, JOHN A. RONSON AND DAVID A. PATTERSON AND O.L.R.B., RE JILL BETTES (Oct.) 1136

Jurisdictional Dispute - Adjournment - Construction Industry - Construction Industry Grievance - Applicant union resisting employer and intervener union's request that Board defer consideration of grievance to allow filing of jurisdictional dispute complaint - Board seeing no reason why jurisdictional dispute forum not appropriate to deal with situation where work assignment given by contractor to trade with which it does not have collective agreement - Grievance adjourned and to be listed with pending jurisdictional dispute

ELLIS-DON CONSTRUCTION LTD.; RE P.A.T.; RE B.S.O.I.W., LOCAL 736 . (Oct.) 1071

Jurisdictional Dispute - Adjournment - Construction Industry - Evidence - Practice and Procedure - Board declining to allow respondent union to make preliminary objection where it had not been included in the union's pre-hearing brief in accordance with Practice Note #15 - Board not allowing respondent union to lead evidence with respect to area practice where union neglected to include job or project lists in its pre-hearing brief - Board allowing evidence of employer practice throughout the province (and not exclusively in Board Area 3) - Having regard to parties consenting to adjourn 12 of 13 days set by Board for hearing, Board declining to set further hearing dates unless request received within 1 month - Board indicating that there will be no consultation with the parties with respect to available dates

ELLIS-DON LIMITED AND O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059 AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL..... (June) 695

Jurisdictional Dispute - Board denying ONA's motion to defer consideration of jurisdictional dispute complaint pending disposition at arbitration of certain grievances - Board satisfied that matters in issue transcending collective agreement issue raised in ONA's grievances and having substantial and proximate jurisdictional dispute element and implications

PIONEER MANOR - HOME FOR THE AGED, THE REGIONAL MUNICIPALITY OF SUDBURY; RE O.N.A. AND C.U.P.E., LOCAL 148 (Nov.) 1219

Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Parties - Whether Board having jurisdiction to hear grievances not dealing exclusively with work performed in the construction industry - Whether the UA should be permitted to intervene in grievance referral where it has not filed, and has expressed no intention to file, a jurisdictional dispute complaint - Board adopting reasons in *Babcock and Wilcox* case and assuming jurisdiction - Board determining that UA has no legal right to participate in proceedings and should not be given intervener status

E.S. FOX LIMITED; RE I.U.O.E. AND ITS LOCAL 793; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1007..... (Apr.) 431

Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Parties - Practice and Procedure - Unfair Labour Practice - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers strict legal interest in proceedings, but exercising its discretion to grant Labourers standing

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS(Jan.)

47

Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Practice and Procedure - General contractor subcontracting work to company having collective agreement with Labourers union, but not with Carpenters union - Carpenters grieving against general contractor alleging breach of subcontracting clause - Whether Board should defer consideration of grievance to allow filing and resolution of jurisdictional dispute complaint - Whether Board has jurisdiction under section 93 of the Act - Board satisfied that nature of grievance filed and its having been communicated to the subcontractor, constituting a demand for work within the meaning of s.93(1) and that Board having jurisdiction to entertain dispute as jurisdictional dispute

ROBERTSON YATES CORPORATION LIMITED; RE C.J.A., LOCAL UNION 785; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL(Apr.)

507

Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Practice and Procedure - Work in dispute assigned to Sheet Metal Workers' union, and Plumbers' union filing grievance against employer - Sheet Metal Workers' union then filing jurisdictional dispute complaint against employer - Plumbers' and employer subsequently settling s. 126 application and asking that jurisdictional dispute be dismissed - No remaining work assignment dispute between the two trade unions - Board dismissing complaint and declining Sheet Metal Workers' request to award costs against Plumbers' union

FELIX LOPES SHEET METAL LTD. AND U.A., LOCAL 800; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 504; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP(June)

706

Jurisdictional Dispute - Construction Industry - Evidence - Practice and Procedure - Ironworkers' union and Plumbers' union disputing assignment of signalling, rigging and other work - Board rejecting argument that complaint should not be heard because matter had been referred to The Plan for Settlement of Jurisdictional Disputes in the Construction Industry - Board finding that trade agreement with respect to work jurisdiction can be revoked or repudiated by one party to the agreement upon the giving of reasonable notice - Board holding that Cooper-Connolly agreement neither an 'international trade agreement', nor a 'local agreement' binding on the locals to this dispute - Board observing that it is the rare and unusual jurisdictional dispute complaint in which the Board does not attach primary weight to area and employer past practice - Board directing assignment of disputed work

EPSCA, ONTARIO HYDRO, U.A., LOCAL 46; RE B.S.O.I.W., LOCAL 721(Aug.)

915

Jurisdictional Dispute - Construction Industry - Evidence - Practice and Procedure - Parties requesting that Board decide, as preliminary matter, scope of relevant past practice evi-

dence with respect to disputed work - Board ruling that evidence should be restricted to ICI sector and to precast concrete ducts (as opposed to all conduit duct banks)

ADAM CLARK COMPANY LTD., I.B.E.W., LOCAL 350 AND; RE L.I.U.N.A., LOCAL 1089.....(Jan.) 6

Jurisdictional Dispute - Construction Industry - Interim National Agreement between Sheet Metal Workers' and Plumbers' unions made in mid-1950s - Sheet Metal Workers' union and its locals only recently seeking to rely on Agreement to assert claim to exclusive jurisdiction over work in dispute - Board not determining complaint on basis of Interim National Agreement without consideration of other criteria

KORA MECHANICAL INC. AND U.A., LOCAL UNION 67; RE S.M.W., LOCAL 537; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP (June) 740

Jurisdictional Dispute - Construction Industry - Practice and Procedure - Board noting general tendency by parties to submit "boiler plate" briefs lacking in particularity in complaints with respect to assignment of work - Board observing that this approach not only retards and undermines pre-hearing process, but also tends to unnecessarily prolong and complicate the hearing of such a complaint

E. S. FOX LTD. AND S.M.W., LOCAL 269; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO, LOCAL 1410; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP (Feb.) 145

Jurisdictional Dispute - Construction Industry - Work in connection with installation of monorail conveyor system in dispute - Millwrights seeking exclusive assignment of work in dispute, but Ironworkers seeking assignment to their members as part of crew made up of equal numbers of members of both unions - While three of the four non-neutral criteria pointing to assignment of work to Millwrights, Board satisfied by evidence as a whole, and particularly evidence surrounding area past practice, that work should be assigned to composite crew

ACCO CANADIAN MATERIAL HANDLING, A DIVISION OF BABCOCK INDUSTRIES CANADA INC. AND B.S.O.I.W., RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1244..... (May) 537

Jurisdictional Dispute - Construction Industry - Work in dispute involving installation of wash-room accessories - General contractor assigning work to carpenters directly employed by it - Plumbers' union relying on International Agreement to claim work - General contractor not employing any plumbers directly and having no collective agreement with Plumbers' union - Board upholding complaint that work should have been assigned in accordance with International Agreement

PIGOTT CONSTRUCTION LIMITED; RE U.A., LOCAL 46; RE C.J.A., LOCAL 27, AND L.I.U.N.A., LOCAL 506..... (June) 748

Jurisdictional Dispute - Practice and Procedure - Board ruling that it would be inappropriate to apply the principles of *res judicata* in the circumstances of this case - Board noting that section 93(1) gives the Board authority to deal only with the assignment of work for which a demand has been made - Board not permitting complainant to amend its complaint to seek further alternative remedy

BOISE CASCADE CANADA LTD.; RE I.A.M., LOCAL 771 AND I.B.E.W., LOCAL 1744..... (Feb.) 127

Lock-Out - Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Employer agreeing to voluntarily recognize union at new location so long as union prepared to enter into separate collective agreement for that location - Union rejecting employer position and

filing complaint at Board - Board finding and declaring that existing collective agreement encompassing new location and that staffing and subsequent operation of new location governed by collective agreement - Board directing that any continuing dispute regarding application of agreement be determined through arbitration and directing parties to waive time limits - Board also finding that employer breached its duty to bargain in good faith in preceding round of negotiations by passing on incomplete and misleading information regarding relocation of employer operations

UNION CARBIDE CANADA LIMITED; RE ENERGY AND CHEMICAL WORKERS UNION, LOCAL 593..... (May)

645

Membership Evidence - Certification - Discharge - Discharge for Union Activity - Petition - Unfair Labour Practice - Board not satisfied that employer's reasons for employee's lay-off entirely free of improper motivation - Board not satisfied that petitions representing voluntary expressions of employee wishes - Board re-affirming that it does not treat revocation, resignation or withdrawal of membership as cancelling or invalidating membership card for purposes of Board's assessment under section 7 of the Act - Allegation that union refused to return petitioner's card, even if true, not creating defect in the membership evidence - Certificate issuing

HAVLIK TECHNOLOGIES INC., (WILLIAMS MACHINES DIVISION); RE C.A.W.; RE GROUP OF EMPLOYEES (Apr.)

468

Membership Evidence - Bargaining Unit - Certification - Evidence - Petition - Objecting employees delivering petition to Office of Official Examiner in Ottawa - Petition not filed with Board prior to terminal date - Board declining to extend terminal date - Board accepting photocopied membership evidence where originals lost through no fault of union - Bargaining rights restricted to employer's Airline Services Division - Certificate issuing

CARA OPERATIONS LIMITED; RE HOTEL, CLUBS, RESTAURANTS, TAVERNS EMPLOYEES UNION, LOCAL 261; RE GROUP OF EMPLOYEES..... (Feb.)

131

Membership Evidence - Certification - Charges - Evidence - Witness - Witness in non-pay inquiry testifying that she paid \$1 when applying for union membership - Witness acknowledging in cross-examination that she had made previous inconsistent statements - Board declining to accept witness' prior inconsistent statements as evidence of the truth of their contents - Board having no affirmative evidence that witness did not pay a dollar in regard to her application - Non-pay allegation dismissed

CAMARO ENTERPRISES LIMITED; RE IUOE, LOCAL 793; RE GROUP OF EMPLOYEES (July)

792

Natural Justice - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking of interim relief - Divisional Court granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Court dismissing motion to produce various reports and documents

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (July)

885

Natural Justice - Bargaining Rights - Bargaining Unit - Certification - Construction Industry - Reconsideration - Employer submitting that Board's decision in *O.J. Pipelines* incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed

TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES.....(Jan.)

90

Natural Justice - Construction Industry - Practice and Procedure - Reconsideration - Termination - Applicant filing termination application after terminal date of earlier application brought by different applicant - Earlier application still pending before the Board - Board assigning terminal date and hearing date to subsequent application but, upon discovering that earlier application had been filed, Board cancelling hearing - Parties' attention drawn to s. 105(3) of the *Act* - Applicant seeking reconsideration - Board rejecting submission that rules of natural justice requiring that parties be afforded opportunity to make submissions before Board exercises discretion pursuant to s.105(3) - Board affirming decision to defer subsequent application pending determination of earlier application -Reconsideration request denied

A & G METRO ROOFING LTD.; RE SIMONE IAQUINTA; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS CONFERENCE, S.M.W. AND S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562.....(July)

769

Natural Justice - Discharge - Evidence - Health and Safety - Judicial Review - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI.....(Mar.)

408

Natural Justice - Discharge - Evidence - Health and Safety - Judicial Review - Practice and Procedure - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... (Sept.)

1058

Parties - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Whether Board having jurisdiction to hear grievances not dealing exclusively with work performed in the construction industry - Whether the UA should be permitted to intervene in grievance referral where it has not filed, and has expressed no intention to file, a jurisdictional dispute complaint - Board adopting reasons in *Babcock and Wilcox* case and assum-

ing jurisdiction - Board determining that UA has no legal right to participate in proceedings and should not be given intervener status

E.S. FOX LIMITED; RE I.U.O.E. AND ITS LOCAL 793; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1007..... (Apr.)

431

Parties - Adjournment - Certification - Construction Industry - Practice and Procedure - Given wording of union's proposed bargaining unit description, Board declining adjournment request to give notice to Canadian Pipe Fabricators Association and to Plumbers' union - Board declining to defer certification application pending determination of two section 126 referrals of grievances to arbitration - Board denying requested adjournment and extension of terminal date because of intervener's certification application - Board ruling that its practice in dealing with intervener applications filed on or before "original" certification application's terminal date is to have that intervener application governed by "original" application's application and terminal dates

E.S. FOX LIMITED; RE SHOPMEN'S LOCAL 834 OF THE B.S.O.I.W.; RE C.J.A. ON BEHALF OF LOCALS 1007, 1151, 1244, 1410, 1425, 1592, 1916 AND 2309; RE U.A., LOCAL UNION 666; RE I.B.E.W., LOCAL 303; RE I.U.O.E., LOCAL 793 (June)

693

Parties - Adjournment - Construction Industry - Construction Industry Grievance - Practice and Procedure - Board denying requested adjournment to seek counsel made by parties seeking to intervene in proceeding - Carpenters' union alleging that work covered under collective agreement with Metro Toronto being performed by other than its members - Contractors seeking to intervene on the ground that they have financial interest in litigation between Carpenters' union and Metro - Board denying contractors intervener status

MUNICIPALITY OF METROPOLITAN TORONTO; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A..... (July)

817

Parties - Bargaining Unit - Certification - Reconsideration - Employer submitting that panel placed undue emphasis on the need to facilitate access to collective bargaining and that it would have framed reply differently had it known that the Board proposed to undertake a review of its jurisprudence - Board noting that employer aware from the outset that the union had placed the bargaining unit issue before the Board - Access to collective bargaining one of several relevant factors considered by the Board - SEIU submitting that it was denied opportunity to participate in the proceeding in that it did not have notice from the Board - Board finding that SEIU had indicated no basis on which it could properly seek standing from the Board to intervene - Reconsideration application dismissed

MISSISSAUGA HOSPITAL, THE; RE PRACTICAL NURSES FEDERATION OF ONTARIO; RE U.S.W.A. (Feb.)

192

Parties - Certification - Practice and Procedure - Following termination of CPU's bargaining rights, rival union making certification application - CPU not receiving notice of application from Board - Board determining that CPU not entitled to notice and not establishing that it represents any employee in the bargaining unit - Board dismissing CPU's application to intervene or participate in certification application

DOMTAR INC.; RE INDEPENDENT PAPERWORKERS OF CANADA..... (Nov.)

1184

Parties - Certification - Practice and Procedure - Unfair Labour Practice - Carpenters' union applying for certification and filing unfair labour practice complaint - Labourers' union seeking to intervene on ground that remedy sought under complaint would have effect of displacing member of Labourers - Labourers also submitting that Board finding might affect outcome of grievance earlier filed by Labourers - Labourers' interest contingent on various factors - Board denying Labourers standing on adjudication of merits of complaint -

Labourers, however, to be given notice of any subsequent hearing to deal with remedy and to have opportunity to show why they should be granted standing for that hearing

AROSAN ENTERPRISES LIMITED; RE C.J.A., LOCAL 93.....(Jan.) 10

Parties - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Unfair Labour Practice - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers strict legal interest in proceedings, but exercising its discretion to grant Labourers standing

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS(Jan.) 47

Parties - Construction Industry - Termination - Union challenging standing of named applicant to bring application and arguing that application a nullity which may not be amended - Since named applicant not at work in bargaining unit on date of application, named applicant without status to bring application - Board, however, questioning utility of technical approach based on existence of "cause of action" and applicability of that approach in labour relations context - Board exercising its discretion under Rules of Procedure to add named petitioners as party applicants

INDUSTRIAL METAL FABRICATORS LIMITED; RE STEPHEN MYERS, RE S.M.W., THE ONTARIO SHEET METAL WORKERS' CONFERENCE AND AFFILIATED BARGAINING AGENTS, LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539, 562 (Oct.) 1083

Petition - Bargaining Unit - Certification - Evidence - Membership Evidence - Objecting employees delivering petition to Office of Official Examiner in Ottawa - Petition not filed with Board prior to terminal date - Board declining to extend terminal date - Board accepting photocopied membership evidence where originals lost through no fault of union - Bargaining rights restricted to employer's Airline Services Division - Certificate issuing

CARA OPERATIONS LIMITED; RE HOTEL, CLUBS, RESTAURANTS, TAVERNS EMPLOYEES UNION, LOCAL 261; RE GROUP OF EMPLOYEES..... (Feb.) 131

Petition - Certification - Charges - Intimidation and Coercion - Board finding reaffirmation document submitted by union representing voluntary wishes of those signing it - Objectors' charges of union misconduct not established on the evidence - Board declining to draw inference of intimidation from fact that employees of Vietnamese origin overwhelmingly supported union and resisted objectors' efforts to persuade them to contrary view - Certificate issuing

RIVERSIDE FABRICATING LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES.....(Aug.) 958

Petition - Certification - Construction Industry - Petitioner's own characterization of his position to employees he solicited, and the freedom with which he moved about and interrupted employees' work in making those solicitations, in the presence of actual members of management, satisfying Board that the employee perspective would likely have been to link the

petitioning activities to the employer - Board according no weight to petition - Certificate issuing	
CAMARO ENTERPRISES LIMITED; RE I.U.O.E. LOCAL 793; RE GROUP OF EMPLOYEES.....(Aug.)	901
Petition - Certification - Construction Industry - Practice and Procedure - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board concluding that petition involuntary viewing petitioners' evidence in the best light, from the petitioners' perspective - Certificate issuing	
HURLEY CORPORATION; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA; RE GROUP OF EMPLOYEES (May)	582
Petition - Certification - Construction Industry - Practice and Procedure - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board observing that fairness and natural justice not demanding that moving party make election whether or not to call evidence in every case - No party asking that union be put to its election in this case and Board exercising its discretion not to require union to elect	
HURLEY CORPORATION; RE L.I.U.N.A.; RE GROUP OF EMPLOYEES(Aug.)	940
Petition - Certification - Discharge - Discharge for Union Activity - Membership Evidence - Unfair Labour Practice - Board not satisfied that employer's reasons for employee's lay-off entirely free of improper motivation - Board not satisfied that petitions representing voluntary expressions of employee wishes - Board re-affirming that it does not treat revocation, resignation or withdrawal of membership as cancelling or invalidating membership card for purposes of Board's assessment under section 7 of the Act - Allegation that union refused to return petitioner's card, even if true, not creating defect in the membership evidence - Certificate issuing	
HAVLIK TECHNOLOGIES INC., (WILLIAMS MACHINES DIVISION); RE C.A.W.; RE GROUP OF EMPLOYEES (Apr.)	468
Petition - Certification - Unfair Labour Practice - Complaint in respect of certain lay-offs, letters from the company to the employees and incident regarding employee wearing union pin allowed - Complaint in all other respects dismissed - Petition held not a reliable indication of voluntary change of heart - Certificate issuing	
THERMOGENICS INC.; RE B.B.F.; RE GROUP OF EMPLOYEES (Feb.)	224
Petition - Termination - Local union officials circulating petition in support of termination application - Although many signatures on petition obtained on company premises during working hours, circumstances not such that employees would reasonably perceive that petition supported by management or that names of employees who declined to sign would become known to management - Collective agreement indicating that it was entered between employer and national union and its local - Board determining that petition naming only national union not defective - Board satisfied that petition voluntary and directing representation vote	
DOMTAR INC.; RE STEPHEN STACEY AND FRANK KING; RE THE C.P.U. AND ITS LOCAL 934 (June)	682
Petition - Termination - Only one person in bargaining unit for purpose of the count and that person signing petition - Board determining that employer interfered with origination of termi-	

nation application and that petition not voluntary expression of employee wishes - Application dismissed

BILL BAILEY OF BELLEVILLE LIMITED; RE ROBERT HARRY MACKLIN; RE U.A. (June)

673

Petition - Termination - Union certified pursuant to section 8 of the *Act* in 1989 - Board noting need to be sensitive to lingering effects of egregious unfair labour practices on likelihood of employees voluntarily seeking to decertify union at first available opportunity thereafter - In all the circumstances, Board concluding that petition not voluntary - Application dismissed

ROYCE DUPONT POULTRY PACKERS; RE ELIZABETH GIERASIMCZUK; RE U.F.C.W., LOCAL 175 (June)

760

Practice and Procedure - Adjournment - Certification - Construction Industry - Construction Industry Grievance - Evidence - Related Employer - Board permitting employer to use tape-recorder but not hand-held video camera to record proceedings - Board denying request for adjournment so that ruling on video camera might be appealed - Board directing all parties to set out all facts and to list and produce all documents upon which they intend to rely prior to next hearing date - Board commenting on standards of decorum to which parties appearing before the Board must adhere

BEMAR CONSTRUCTION (ONTARIO) INC.; RE I.B.E.W., LOCAL 353 (May)

565

Practice and Procedure - Adjournment - Certification - Construction Industry - Parties - Given wording of union's proposed bargaining unit description, Board declining adjournment request to give notice to Canadian Pipe Fabricators Association and to Plumbers' union - Board declining to defer certification application pending determination of two section 126 referrals of grievances to arbitration - Board denying requested adjournment and extension of terminal date because of intervener's certification application - Board ruling that its practice in dealing with intervener applications filed on or before "original" certification application's terminal date is to have that intervener application governed by "original" application's application and terminal dates

E.S. FOX LIMITED; RE SHOPMEN'S LOCAL 834 OF THE B.S.O.I.W.; RE C.J.A. ON BEHALF OF LOCALS 1007, 1151, 1244, 1410, 1425, 1592, 1916 AND 2309; RE U.A., LOCAL UNION 666; RE I.B.E.W., LOCAL 303; RE I.U.O.E., LOCAL 793 (June)

693

Practice and Procedure - Adjournment - Construction Industry - Construction Industry Grievance - Parties - Board denying requested adjournment to seek counsel made by parties seeking to intervene in proceeding - Carpenters' union alleging that work covered under collective agreement with Metro Toronto being performed by other than its members - Contractors seeking to intervene on the ground that they have financial interest in litigation between Carpenters' union and Metro - Board denying contractors intervener status

MUNICIPALITY OF METROPOLITAN TORONTO; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A. (July)

817

Practice and Procedure - Adjournment - Construction Industry - Evidence - Jurisdictional Dispute - Board declining to allow respondent union to make preliminary objection where it had not been included in the union's pre-hearing brief in accordance with Practice Note #15 - Board not allowing respondent union to lead evidence with respect to area practice where union neglected to include job or project lists in its pre-hearing brief - Board allowing evidence of employer practice throughout the province (and not exclusively in Board Area 3) - Having regard to parties consenting to adjourn 12 of 13 days set by Board for hearing, Board declining to set further hearing dates unless request received within 1 month

- Board indicating that there will be no consultation with the parties with respect to available dates

ELLIS-DON LIMITED AND O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059 AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL..... (June) 695

Practice and Procedure - Adjournment - Construction Industry - Related Employer - Board denying adjournment request made because respondents attempted to retain counsel virtually at last minute - Whether respondent companies engaged in related activities - But for "plumbing" work, activities of the two companies identical - Board holding that merely because a very small part of the work performed by the second respondent would be covered by the collective agreement with the first respondent not sufficient reason to deny union its remedy - Declaration issuing

ACME PLUMBING & HEATING, VINCENT J. TRUDEAU & SONS INC. C.O.B. AS, AND 883553 ONTARIO INC. C.O.B. AS ACME BIVALENT SYSTEMS; RE U.A., LOCAL 463 (Jan.) 1

Practice and Procedure - Adjournment - First Contract Arbitration - Employer seeking adjournment on grounds that its counsel had been its spokesperson in negotiations and anticipated being in position of both witness and counsel at the Board hearing - Adjournment request denied - Board finding that employer's positions on monetary issues, its attempts to limit opportunity for arbitral review of employer decisions and to undermine just cause protection and recognition of seniority representing underlying refusal to recognize union's bargaining authority - Various employer proposals, including two-tier wage proposal taken without reasonable justification - Employer failing to make reasonable or expeditious efforts to conclude collective agreement - Board directing first contract arbitration

BOYS' HOME, THE; RE C.U.P.E. AND ITS LOCAL 3501..... (Apr.) 409

Practice and Procedure - Adjournment - Health and Safety - Complainant's counsel writing to Board on the day before hearing seeking adjournment on the ground that he was not ready to proceed - Neither complainant nor his counsel appearing at hearing - Board not satisfied that adjournment justified for several reasons, including fact that request not made in a timely manner - Complaint dismissed

AB COX PONTIAC BUICK GMC LTD.; RE LEONARD PERRY (June) 665

Practice and Procedure - Adjournment - Sale of a Business - Stay - Unfair Labour Practice - Whether order issued by Quebec Superior Court under the *Companies' Creditors Arrangement Act* (C.C.A.A.) staying proceedings before the Board - Board determining that order staying proceeding against first respondent - Second respondent not entitled to relief under C.C.A.A., but Board viewing it as impossible to disentangle proceedings to permit matter to continue against second respondent and to be stayed against first respondent - Complainant given option to await expiration of stay order, to obtain modification of the stay or to withdraw complaint and claim for relief against first respondent

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS LOCAL UNION NO. 419 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE R.W.S.D.U., AFL CIO CLC, AND ITS LOCAL 414 (July) 860

Practice and Procedure - Adjournment - Unfair Labour Practice - Union counsel requesting adjournment because he had only been retained the day before - In the circumstances, Board not satisfied that last-minute change of counsel warranting adjournment - Board con-

cluding that neither employer's decision to change grievor's shift, nor its provision of written instructions to grievor improperly motivated - Complaint dismissed

CYBERMEDIX HEALTH SERVICES LIMITED; RE O.P.S.E.U. (Mar.) 308

Practice and Procedure - Certification - Certification Where Act Contravened - Discharge - Unfair Labour Practice - Failure to secure employees' written authorization not precluding union from claiming relief on behalf of those employees - Board finding employee's suspension, certain demotions and lay-offs motivated by anti-union animus - Employer harassment and warning letter directing in-plant organizer to cease collecting cards on company property, in circumstances, violating the Act - Various employer statements at employee meetings also violating the Act - Board issuing certificate pursuant to section 8 of the *Act*

ROYAL HOMES LIMITED; RE C.J.A., LOCAL 27; RE GROUP OF EMPLOYEES; RE C.J.A., LOCAL 3054..... (Feb.) 199

Practice and Procedure - Certification - Charges - Inquiry into non-pay allegation disclosing loan by fellow employee and repayment - Board seeing no reason to direct hearing into allegation - Board to dispose of certification application without further notice unless it receives submissions from any party showing why the Board should hold a hearing into the allegation

BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE U.P.G.W.A. (Jan.) 15

Practice and Procedure - Certification - Construction Industry - Employee - Evidence - Board satisfied that certain documents properly admitted as exhibits by Officer conducting examination in the exercise of his discretion - *E. & E. Seegmiller* case explained - Onus of proof regarding employee list issues lying with party seeking to exclude the person whose status is in question, except where it would have to prove a negative in order to succeed

CAMARO ENTERPRISES LIMITED C.O.B. AS MULДАР CONSTRUCTION AND C.O.B. AS PARK TRUCKING, WALTER AMBROZIK, ERWIN MOWATSKI, ANNE MOWATSKI; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES..... (Apr.) 423

Practice and Procedure - Certification - Construction Industry - Employer - Evidence - Unfair Labour Practice - Board concerned that procedural skirmishes concerning production may deflect the parties' focus from substantive issues and unnecessarily prolong the hearing - Board directing all parties to identify and list all documents upon which they intend to rely in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date

GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN BAND; RE L.I.U.N.A., LOCAL 607 (Feb.) 174

Practice and Procedure - Certification - Construction Industry - Petition - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board concluding that petition involuntary viewing petitioners' evidence in the best light, from the petitioners' perspective - Certificate issuing

HURLEY CORPORATION; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA; RE GROUP OF EMPLOYEES (May) 582

Practice and Procedure - Certification - Construction Industry - Petition - At conclusion of objecting employees' evidence regarding voluntariness of petition, employer electing to call no evidence and union making motion for non-suit - Board observing that fairness and natural justice not demanding that moving party make election whether or not to call evidence in every case - No party asking that union be put to its election in this case and Board exercising its discretion not to require union to elect

HURLEY CORPORATION; RE L.I.U.N.A.; RE GROUP OF EMPLOYEES..... (Aug.) 940

- Practice and Procedure - Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Board reconsidering its customary practice with respect to voter eligibility in construction industry certification applications and concluding that dual voter eligibility dates not appropriate - Board determining that in construction industry certification applications, those eligible to vote will be those at work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date
- CRETE FLOORING GROUP LIMITED; RE L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 (July) 792
- Practice and Procedure - Certification - Parties - Following termination of CPU's bargaining rights, rival union making certification application - CPU not receiving notice of application from Board - Board determining that CPU not entitled to notice and not establishing that it represents any employee in the bargaining unit - Board dismissing CPU's application to intervene or participate in certification application
- DOMTAR INC.; RE INDEPENDENT PAPERWORKERS OF CANADA (Nov.) 1184
- Practice and Procedure - Certification - Parties - Unfair Labour Practice - Carpenters' union applying for certification and filing unfair labour practice complaint - Labourers' union seeking to intervene on ground that remedy sought under complaint would have effect of displacing member of Labourers - Labourers also submitting that Board finding might affect outcome of grievance earlier filed by Labourers - Labourers' interest contingent on various factors - Board denying Labourers standing on adjudication of merits of complaint - Labourers, however, to be given notice of any subsequent hearing to deal with remedy and to have opportunity to show why they should be granted standing for that hearing
- AROSAN ENTERPRISES LIMITED; RE C.J.A., LOCAL 93 (Jan.) 10
- Practice and Procedure - Certification - Reconsideration - Board hearing certification application and two unfair labour practice complaints together - Board ruling that it would first hear evidence concerning challenges to the list and issue a decision on those challenges before inquiring into voluntariness of petition and unfair labour practice complaints - Board deciding that three individuals should be included on the list and then beginning to hear evidence concerning the petition and complaints - Union seeking reconsideration on the ground that evidence elicited in relation to the unfair labour practice complaint contradicts findings of Board in its decision on the list - Board unwilling to reconsider its decision based on evidence which came out subsequent to that decision which was readily available and could have been called by the union, but was not - Request for reconsideration dismissed
- GEORGIAN INDUSTRIES INC.; RE A.C.T.W.U.; RE GROUP OF EMPLOYEES (Apr.) 459
- Practice and Procedure - Certification - Trade Union Status - Employer not challenging trade union status and having no objection to Board relying on documents filed by applicant in respect of status issue - Board satisfied that applicant a trade union within meaning of the Act - Certificate issuing
- CANADA SECURITY CORPORATION; RE CANADIAN SECURITY UNION (Feb.) 129
- Practice and Procedure - Certification - Unfair Labour Practice - Union seeking to withdraw certification application and unfair labour practice complaint - Employer urging that unfair labour practice complaint be dismissed "with prejudice" and that certification application be dismissed with endorsement reserving employer's right to argue that there should be a bar if the union filed a new application - Objectors asking Board to impose immediate six-month bar - Board considering rationale for imposing bar in certain cases and reviewing

practical distinction between “withdrawal” and “dismissal” of Board proceedings - Certification application dismissed without bar - Complaint withdrawn

R.J.R. MACDONALD INC.; RE B.C.T. AFL-CIO-CLC; RE GROUP OF EMPLOYEES..... (Apr.) 503

Practice and Procedure - Construction Industry - Construction Industry Grievance - Evidence - Sector Determination - Parties disputing scope of work and scope of evidence relevant to sector determination - Board deciding that parties free to rely on industry practice throughout the province in regards to employee relations on the type of work in dispute - Subject of sector determination identified as work related to installation of large underground concrete storage tanks associated with water treatment purposes

MATTHEWS CONTRACTING INC.; RE C.J.A., LOCAL 18; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Oct.) 1088

Practice and Procedure - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - General contractor subcontracting work to company having collective agreement with Labourers union, but not with Carpenters union - Carpenters grieving against general contractor alleging breach of subcontracting clause - Whether Board should defer consideration of grievance to allow filing and resolution of jurisdictional dispute complaint - Whether Board has jurisdiction under section 93 of the *Act* - Board satisfied that nature of grievance filed and its having been communicated to the subcontractor, constituting a demand for work within the meaning of s.93(1) and that Board having jurisdiction to entertain dispute as jurisdictional dispute

ROBERTSON YATES CORPORATION LIMITED; RE C.J.A., LOCAL UNION 785; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL (Apr.) 507

Practice and Procedure - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Unfair Labour Practice - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers strict legal interest in proceedings, but exercising its discretion to grant Labourers standing

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS (Jan.) 47

Practice and Procedure - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Work in dispute assigned to Sheet Metal Workers' union, and Plumbers' union filing grievance against employer - Sheet Metal Workers' union then filing jurisdictional dispute complaint against employer - Plumbers' and employer subsequently settling s. 126 application and asking that jurisdictional dispute be dismissed - No remaining work assignment dispute between the two trade unions - Board dismissing complaint and declining Sheet Metal Workers' request to award costs against Plumbers' union

FELIX LOPES SHEET METAL LTD. AND U.A., LOCAL 800; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 504; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP (June) 706

Practice and Procedure - Construction Industry - Construction Industry Grievance - Remedies -

Board allowing union's grievance in May 1991 decision and remaining seized on the issue of damages - Subsequent to May 1991 decision, Vice-Chair of panel issuing decision dying - Employer arguing that Board without jurisdiction to substitute Vice-Chairs and that liability issue would have to be reheard - Board satisfied that it has jurisdiction to continue

OTIS ELEVATOR COMPANY LIMITED; RE I.U.E.C., LOCAL 50..... (Apr.) 497

Practice and Procedure - Construction Industry - Evidence - Jurisdictional Dispute - Ironworkers' union and Plumbers' union disputing assignment of signalling, rigging and other work - Board rejecting argument that complaint should not be heard because matter had been referred to The Plan for Settlement of Jurisdictional Disputes in the Construction Industry - Board finding that trade agreement with respect to work jurisdiction can be revoked or repudiated by one party to the agreement upon the giving of reasonable notice - Board holding that Cooper-Connolly agreement neither an 'international trade agreement', nor a 'local agreement' binding on the locals to this dispute - Board observing that it is the rare and unusual jurisdictional dispute complaint in which the Board does not attach primary weight to area and employer past practice - Board directing assignment of disputed work

EPSCA, ONTARIO HYDRO, U.A., LOCAL 46; RE B.S.O.I.W., LOCAL 721 (Aug.) 915

Practice and Procedure - Construction Industry - Evidence - Jurisdictional Dispute - Parties requesting that Board decide, as preliminary matter, scope of relevant past practice evidence with respect to disputed work - Board ruling that evidence should be restricted to ICI sector and to precast concrete ducts (as opposed to all conduit duct banks)

ADAM CLARK COMPANY LTD., I.B.E.W., LOCAL 350 AND; RE L.I.U.N.A., LOCAL 1089..... (Jan.) 6

Practice and Procedure - Construction Industry - Jurisdictional Dispute - Board noting general tendency by parties to submit "boiler plate" briefs lacking in particularity in complaints with respect to assignment of work - Board observing that this approach not only retards and undermines pre-hearing process, but also tends to unnecessarily prolong and complicate the hearing of such a complaint

E. S. FOX LTD. AND S.M.W., LOCAL 269; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO, LOCAL 1410; RE ONTARIO SHEET METAL AND AIR HANDLING GROUP..... (Feb.) 145

Practice and Procedure - Construction Industry - Natural Justice - Reconsideration - Termination - Applicant filing termination application after terminal date of earlier application brought by different applicant - Earlier application still pending before the Board - Board assigning terminal date and hearing date to subsequent application but, upon discovering that earlier application had been filed, Board cancelling hearing - Parties' attention drawn to s. 105(3) of the *Act* - Applicant seeking reconsideration - Board rejecting submission that rules of natural justice requiring that parties be afforded opportunity to make submissions before Board exercises discretion pursuant to s.105(3) - Board affirming decision to defer subsequent application pending determination of earlier application - Reconsideration request denied

A & G METRO ROOFING LTD.; RE SIMONE IAQUINTA; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS CONFERENCE, S.M.W. AND S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562..... (July) 769

Practice and Procedure - Discharge - Duty of Fair Representation - Evidence - Practice and Procedure - Unfair Labour Practice - Board declining to hear evidence of Labour Relations Officer's settlement endeavours - Employee hired on call-in basis subsequently discharged - Local union president having only brief and casual conversation with complainant after her discharge - Local president failing to respond to complainant's letter or to any of numerous

telephone calls - Union demonstrating “not caring” attitude - Fair representation complaint upheld

CRAIG, TANYA; RE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 203, AND CONSUMERS GLASS (Jan.) 16

Practice and Procedure - Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... (Mar.) 408

Practice and Procedure - Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Witness - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... (Sept.) 1058

Practice and Procedure - Duty of Fair Representation - Unfair Labour Practice - Union filing lengthy reply to employee's complaint and asking that it be dismissed without a hearing on a number of grounds - Complainant directed to respond to union's reply and to address certain concerns raised in complaint within 30 days

EUGENE DESEIRE SOLOMON; RE R.W.D.S.U..... (May) 639

Practice and Procedure - Employee Reference - Employer submitting that inquiry authorized by the Board ought not to proceed until the union provides additional information specified in earlier Board decision - Board noting applicability of Practice Note #4 to this situation and ruling that the Officer will determine whether or not the union has complied sufficiently with the Board's direction to permit inquiry to proceed

J.M. SCHNEIDER INC.; RE SCHNEIDER OFFICE EMPLOYEES' ASSOCIATION ... (Feb.) 186

Practice and Procedure - Evidence - Sale of a Business - Witness - Board not persuaded that statutory duty under sub-section 64(13) satisfied through production by only one of the respondents of a witness to testify with respect to the allegation that a sale occurred - Second respondent directed to adduce, through *viva voce* testimony at the hearing, “all facts within their knowledge that are material to the allegation”

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS' UNION, LOCAL 419; RE R.W.D.S.U., AFL CIO CLC AND ITS LOCAL 414..... (Feb.) 223

Practice and Procedure - Jurisdictional Dispute - Board ruling that it would be inappropriate to apply the principles of *res judicata* in the circumstances of this case - Board noting that section 93(1) gives the Board authority to deal only with the assignment of work for which a

demand has been made - Board not permitting complainant to amend its complaint to seek further alternative remedy

BOISE CASCADE CANADA LTD.; RE I.A.M., LOCAL 771 AND I.B.E.W., LOCAL 1744..... (Feb.)

127

Practice and Procedure - Trusteeship - Board receiving April 1992 letter from General Secretary of International Union stating that local placed under trusteeship in April 1991 - Board treating letter as request under s. 84(2) of the *Act* to extend terms of trusteeship - Board directing International Union to bring its request to the attention of Local members - Members to have six weeks to advise Board in writing whether or not they oppose International's request

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS; RE B.S.O.I.W., SHOPMEN'S LOCAL UNION 834, TORONTO, ONTARIO (May)

584

Practice and Procedure - Unfair Labour Practice - Board directing pre-hearing filing of respondent employer's reply to union's unfair labour practice complaint, as well as disclosure of documents - Union directed to fully particularize complaint and to supply employer with documents upon which it intends to rely - Both parties directed to indicate number of witnesses to be called and estimated number of hearing days required - Board directing pre-hearing conference with parties and counsel

TOWNSHIP OF LAKE OF BAYS; RE GRAHAM JOHNSON, O.P.S.E.U. (Aug.)

970

Pre-Hearing Vote - Bargaining Unit - Certification - Construction Industry - Parties disputing whether intervener having valid collective agreement with employer - Applicant asking that, in addition to standard question on displacement application, ballot contain standard question on certification application - Board noting that it would be confusing and inappropriate to attempt to "cover all the bases" in vote by asking series of questions - Board concluding that given appearance of displacement application, usual question on displacement application, and only that question, to be asked on ballot

ABS MASONRY, 419990 ONTARIO LTD. C.O.B. AS; RE B.A.C., LOCAL 2 AND B.M.I.U., LOCAL 1..... (May)

535

Pre-Hearing Vote - Bargaining Unit - Certification - Employee - Employer taking position in reply to union's certification application that bargaining unit should include second location within municipality - Union claiming that employees not sharing community of interest - Union also seeking to reserve its right, pending further investigation following pre-hearing vote, to challenge managerial or employee status of employees at second location - Absent appropriate challenges being made up to and including the time of the actual taking of the vote, Board seeing no basis for directing segregation of all ballots - Board finding no basis for allowing union to reserve any right to make challenges following the taking of the vote

POLYTARP PRODUCTS, ALROS PRODUCTS LIMITED C.O.B. AS;
RE U.S.W.A..... (Apr.)

502

Pre-Hearing Vote - Certification - Construction Industry - Representation Vote - Practice and Procedure - Board reconsidering its customary practice with respect to voter eligibility in construction industry certification applications and concluding that dual voter eligibility dates not appropriate - Board determining that in construction industry certification applications, those eligible to vote will be those at work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date

CRETE FLOORING GROUP LIMITED; RE L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 (July)

792

Pre-Hearing Vote - Certification - Construction Industry - Representation Vote - Reconsideration

- Unfair Labour Practice - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in *Crete Flooring* case - Nothing in *Crete Flooring* suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed

METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 (Sept.)

1007

Pre-Hearing Vote - Certification - *Hospital Labour Disputes Arbitration Act* - Interest Arbitration - Timeliness - Interest arbitration award on 'central issues' issued in December 1991 - Award establishing term of collective agreement to be from April 1, 1990 to March 31, 1992 - Rival union making displacement certification application in February 1992 - 'Local issues' arbitration award still outstanding and collective agreement for 1990-92 period not yet made - Board finding displacement application timely under HLDAA as falling within 60 days preceding March 31, 1992 or, alternatively, within 90 days after 'central issues' award - Board directing that ballots cast in pre-hearing vote be counted

CHATEAU GARDENS QUEENS, MERCEDES CORPORATION C.O.B. AS; RE C.L.A.C.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220 (Aug.)

906

Pre-Hearing Vote - Certification - Timeliness - Respondent and intervener submitting that no pre-hearing vote ought to be directed because application untimely - Respondent and intervener signing new collective agreement following recent decision of the Board granting joint request for early termination of collective agreement - Applicant seeking reconsideration of Board's decision granting early termination - Board directing that pre-hearing representation vote be taken and that ballots be sealed until parties have been given full opportunity to present their evidence and make their submissions

LEDOR INDUSTRIES LIMITED; RE L.I.U.N.A., LOCAL 183; RE C.L.A.C. . (Feb.)

190

Pre-Hearing Vote - Certification - Union applying for certification by way of pre-hearing vote - Terminal date set for Friday and Officer's meeting scheduled for following Monday - No opportunity to involve Board Officer in any kind of "waiver process" - Union requesting copy of employee list to review in advance of meeting - Employer objecting - Board directing that employee list be circulated immediately

POLYTARP PRODUCTS, ALROS PRODUCTS LIMITED C.O.B. AS; RE U.S.W.A. (Apr.)

498

Pre-Hearing Vote - Certification - Union making certification application on April 7 and, after reviewing employees lists, withdrawing application on May 6 - Union making subsequent pre-hearing certification applications for full-time and part-time employees on May 12 - After meeting with Labour Relations Officer and reviewing employee lists, union seeking to withdraw applications - Employer requesting that applications be dismissed, that six month bar on further applications be imposed, and that union's membership position in the applications be disclosed to employer - Board dismissing certification applications, but declining to impose bar or release union's membership count

CHIMO INNS, THE DOUGLAS MACDONALD DEVELOPMENT CORPORATION C.O.B.; RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; RE GROUP OF EMPLOYEES (July)

786

Pre-Hearing Vote - Certification - Voluntary Recognition - Union advising Board that outstanding representational issues resolved on basis of executed and ratified voluntary recognition

agreement - Union seeking leave to withdraw certification application - Individual employee asking Board to address issues raised earlier in proceeding - Application dismissed

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E. - C.L.C., ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE THE COALITION TO STOP CERTIFICATION OF THE SOCIETY ON BEHALF OF CERTAIN EMPLOYEES..... (Apr.)

495

Reconsideration - Bargaining Rights - Bargaining Unit - Certification - Construction Industry - Natural Justice - Employer submitting that Board's decision in *O.J. Pipelines* incorrect - Board not convinced that it should describe unit in certification application so as to conform with bargaining rights described in provincial collective agreement - Employer and group of employees submitting that Board's notices in Forms 77 and 78 inadequate to alert employer and employees how certification would affect them - Board ruling that sufficient and proper notice given - Notice of specific potential legal consequences which might flow from certification neither required nor appropriate - Reconsideration application dismissed

TURN-KEY INSTALLATIONS INC.; RE U.A., LOCAL 463 RE GROUP OF EMPLOYEES..... (Jan.)

90

Reconsideration - Bargaining Unit - Certification - Parties - Employer submitting that panel placed undue emphasis on the need to facilitate access to collective bargaining and that it would have framed reply differently had it known that the Board proposed to undertake a review of its jurisprudence - Board noting that employer aware from the outset that the union had placed the bargaining unit issue before the Board - Access to collective bargaining one of several relevant factors considered by the Board - SEIU submitting that it was denied opportunity to participate in the proceeding in that it did not have notice from the Board - Board finding that SEIU had indicated no basis on which it could properly seek standing from the Board to intervene - Reconsideration application dismissed

MISSISSAUGA HOSPITAL, THE; RE PRACTICAL NURSES FEDERATION OF ONTARIO; RE U.S.W.A. (Feb.)

191

Reconsideration - Certification - Charges - Construction Industry - Employee making "non-pay" allegation and seeking revocation of certificate - Facts pleaded not disclosing "non-pay" - Board reviewing and applying *Calvano Lumber* case in respect of "loan" issue and effect on Form 80 declaration - Reconsideration application dismissed

KEN ACTON PLUMBING & HEATING INC.; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES..... (Feb.)

187

Reconsideration - Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Unfair Labour Practice - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in *Crete Flooring* case - Nothing in *Crete Flooring* suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed

METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598..... (Sept.)

1007

Reconsideration - Certification - Employer seeking revocation of earlier certification decision on ground that it had not filed sample signatures as directed by the Board - Board weighing desirability of double-checking mechanism with necessity for expedition in certification matters - Board striking balance by requiring sample signatures, but where these are not

filed in timely manner, deciding matter on evidence before it - Board declining to reconsider its certification decision

A & L CANADA LABORATORIES EAST, INC.; RE ENERGY AND CHEMICAL WORKERS UNION..... (Sept.) 983

Reconsideration - Certification - Practice and Procedure - Board hearing certification application and two unfair labour practice complaints together - Board ruling that it would first hear evidence concerning challenges to the list and issue a decision on those challenges before inquiring into voluntariness of petition and unfair labour practice complaints - Board deciding that three individuals should be included on the list and then beginning to hear evidence concerning the petition and complaints - Union seeking reconsideration on the ground that evidence elicited in relation to the unfair labour practice complaint contradicts findings of Board in its decision on the list - Board unwilling to reconsider its decision based on evidence which came out subsequent to that decision which was readily available and could have been called by the union, but was not - Request for reconsideration dismissed

GEORGIAN INDUSTRIES INC.; RE A.C.T.W.U.; RE GROUP OF EMPLOYEES (Apr.) 459

Reconsideration - Charges - Fraud - Termination - Employee alleging that union obtained its certificate by fraud and that bargaining rights should be terminated - Board determining that certain allegations not contributing to *prima facie* case - Other allegations dismissed on basis of lack of particularity and delay - Reconsideration application and termination application dismissed

CAMBRIDGE REPORTER; RE DIRK KOEHLER, FOR THE EMPLOYEES OF THE CAMBRIDGE REPORTER; RE THE SOUTHERN ONTARIO NEWSPAPER GUILD UNIT, CAMBRIDGE, ONT. (LOCAL 87)..... (Oct.) 1059

Reconsideration - Construction Industry - Natural Justice - Practice and Procedure - Termination - Applicant filing termination application after terminal date of earlier application brought by different applicant - Earlier application still pending before the Board - Board assigning terminal date and hearing date to subsequent application but, upon discovering that earlier application had been filed, Board cancelling hearing - Parties' attention drawn to s. 105(3) of the *Act* - Applicant seeking reconsideration - Board rejecting submission that rules of natural justice requiring that parties be afforded opportunity to make submissions before Board exercises discretion pursuant to s.105(3) - Board affirming decision to defer subsequent application pending determination of earlier application - Reconsideration request denied

A & G METRO ROOFING LTD.; RE SIMONE IAQUINTA; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS CONFERENCE, S.M.W. AND S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562..... (July) 769

Related Employer - Adjournment - Certification - Construction Industry - Construction Industry Grievance - Evidence - Practice and Procedure - Board permitting employer to use tape-recorder but not hand-held video camera to record proceedings - Board denying request for adjournment so that ruling on video camera might be appealed - Board directing all parties to set out all facts and to list and produce all documents upon which they intend to rely prior to next hearing date - Board commenting on standards of decorum to which parties appearing before the Board must adhere

BEMAR CONSTRUCTION (ONTARIO) INC.; RE I.B.E.W., LOCAL 353 (May) 565

Related Employer - Adjournment - Construction Industry - Practice and Procedure - Board denying adjournment request made because respondents attempted to retain counsel virtually at last minute - Whether respondent companies engaged in related activities - But for "plumbing" work, activities of the two companies identical - Board holding that merely because a

very small part of the work performed by the second respondent would be covered by the collective agreement with the first respondent not sufficient reason to deny union its remedy - Declaration issuing

ACME PLUMBING & HEATING, VINCENT J. TRUDEAU & SONS INC. C.O.B. AS, AND 883553 ONTARIO INC. C.O.B. AS ACME BIVALENT SYSTEMS; RE U.A., LOCAL 463 (Jan.)

1

Related Employer - Certification - Construction Industry - Remedies - Board finding developer, owner and contractor to be separate entities under common control and direction engaged in related activity - Board exercising discretion to grant single employer declaration limited to agreed to bargaining unit - Certificates issuing

ITALIAN CANADIAN BENEVOLENT CORPORATION (TORONTO DISTRICT); RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A. (Oct.)

1074

Related Employer - Certification - Employer - First respondent operating theatre complex under agreement with complex owner - Other respondents, amongst others, using complex under licence for producing or presenting theatrical productions - Respondents under common control or direction - Respondents asserting that they carry on businesses separately but in a related enterprise - Common employer declaration issuing - Board, however, finding the "producer" rather than "the house" to be the employer of the stagehands dispatched from the union's hiring hall - Board determining that for purposes of "the count" in this industry, the employee complement is that which exists on the application date - As there were no employees of the named respondents at work in the bargaining unit at the time the application was made, certification application dismissed

THEATRECOP LTD., AND WGC FACILITY MANAGEMENT CORPORATION AND THEATREMART LTD.; RE I.A.T.S.E., LOCAL 58, TORONTO..... (Mar.)

388

Related Employer - Certification - Union seeking to represent building resident superintendents and asserting that 3 condominium corporations are related employers - Membership and board of directors of corporations entirely separate, but common property manager acting on behalf of the 3 corporations - Board finding employment activities of the superintendents inter-related and inter-dependent - "Common direction and control" residing in property manager extending to all day-to-day activities relating to purposes of the corporations - Board issuing related employer declaration - Certificate granted

METROPOLITAN TORONTO CONDOMINIUM CORPORATION #880; METROPOLITAN TORONTO CONDOMINIUM CORPORATION #897; METROPOLITAN TORONTO CONDOMINIUM CORPORATION #934; RE L.I.U.N.A., LOCAL 183 (Dec.)

1145

Related Employer - Collective Agreement - Construction Industry - Employer Support - Remedies - Voluntary Recognition - Board rejecting respondent's submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union's low-rise residential agreement

WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353..... (Feb.)

262

Related Employer - Construction Industry - Damages - Remedies - Board declaring that respondent companies be treated as one employer for purposes of the *Act* and not limiting retro-

spective effect of the declaration - Board also directing that second respondent pay union the unsatisfied damages, if any, arising out of a damages award made 7 months earlier against first respondent by another panel of the Board in a section 126 proceeding

GOLDEN ARM FLOORING INC., R.R. PROJECTS INC.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27 CJA..... (June) 731

Related Employer - Construction Industry - Remedies - Parties agreeing that legal requirements for single employer declaration present - Whether, in view of conduct of employees or union's business representative, Board should exercise its discretion to issue declaration - Board making section 1(4) declaration, but limiting its effect to those commercial activities or contracts entered into after receipt of section 1(4) application

JARRETT CONSTRUCTION LTD. AND JARRETT COMMERCIAL CONTRACTING; RE C.J.A., LOCAL 27..... (May) 586

Related Employer - Construction Industry - Sale of a Business - Woodwork company sold by "F" going bankrupt - "F" incorporating new company, purchasing some of bankrupt company's equipment and carrying on substantially same business - Board finding "F" to be "key person" - Related employer declaration issuing - Board also finding sale of a business and declaring that union has bargaining rights for employees of successor employer

ECONOMY STORE FIXTURES LIMITED AND FLAIR WOODWORKING LTD.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A.; RE CANADIAN WOODWORK MANUFACTURERS ASSOCIATION (May) 575

Related Employer - Sale of a Business - Union asserting that non-profit community centre and regional municipality carrying on related activities in provision of social services under common control or direction - Union submitting, in alternative, that there had been transfer of administration and delivery of social services constituting sale of a business - Municipality's assistance and participation not translating into control or direction - No transfer - Applications dismissed

PINECREST-QUEENSWAY HEALTH AND COMMUNITY SERVICES, REGIONAL MUNICIPALITY OF OTTAWA-CARLETON AND; RE OTTAWA-CARLETON PUBLIC EMPLOYEES UNION, LOCAL 503 (Nov.) 1211

Remedies - Adjournment - Discharge - Health and Safety - Witness - Employer seeking adjournment of four continuation hearing dates on the ground that he could not afford to bring witnesses away from work to the hearing and because he had several important meetings to attend to - Board denying adjournment request, employer departing and hearing continuing in absence of employer - On the basis of the evidence before it, Board satisfied that complainant discharged, at least in part, because he gave evidence in an earlier Board proceeding involving his employer and an other employee, in violation of section 50(1) of the *Occupational Health and Safety Act* - Complaint upheld, damages quantified and awarded, and employer directed to post Board's decision in the workplace

WHITLER INDUSTRIES LIMITED; RE ROGER KENNEDY..... (Aug.) 977

Remedies - Bargaining Unit - Duty to Bargain in Good Faith - Unfair Labour Practice - Voluntary Recognition - Employer seeking recognition clause different from one found in voluntary recognition agreement - Board finding that parties had bargained to impasse and that employer's insistence on pressing its position on bargaining unit constituting bargaining in bad faith - Board making cease and desist direction, but declining to order payment of damages

WELLINGTON COUNTY SEPARATE SCHOOL BOARD, THE; RE WELLINGTON SEPARATE SUPPORT STAFF ASSOCIATION (Oct.) 1128

Remedies - Certification - Certification Where Act Contravened - Discharge - Discharge for

Union Activity - Unfair Labour Practice - Discharges not motivated solely by legitimate business reasons - Reinstatement appropriate even where there is successor employer - Board issuing certificate pursuant to section 8 of the Act	
BEAVER LUMBER, WENTWORTH BEAVER LIMITED C.O.B. AS; RE R.W.D.S.U., AFL:CIO:CLC	(May) 553
Remedies - Certification - Construction Industry - Related Employer - Board finding developer, owner and contractor to be separate entities under common control and direction engaged in related activity - Board exercising discretion to grant single employer declaration limited to agreed to bargaining unit - Certificates issuing	
ITALIAN CANADIAN BENEVOLENT CORPORATION (TORONTO DISTRICT); RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A.	(Oct.) 1074
Remedies - Collective Agreement - Construction Industry - Employer Support - Related Employer - Voluntary Recognition - Board rejecting respondent's submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union's low-rise residential agreement	
WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353	(Feb.) 262
Remedies - Construction Industry - Construction Industry Grievance - Employer grieving against employee and against union alleging improper claim and receipt of room and board allowance - Employer claiming damages - Nothing in collective agreement giving Board the power to award damages against employee - Board dismissing employer's request for damages, but holding that declaratory relief available - Declaration issuing	
ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, H.F.I.A., AND H.F.I.A., LOCAL 95 AND JAMES C. CORD	(Apr.) 445
Remedies - Construction Industry - Construction Industry Grievance - Practice and Procedure - Board allowing union's grievance in May 1991 decision and remaining seized on the issue of damages - Subsequent to May 1991 decision, Vice-Chair of panel issuing decision dying - Employer arguing that Board without jurisdiction to substitute Vice-Chairs and that liability issue would have to be reheard - Board satisfied that it has jurisdiction to continue	
OTIS ELEVATOR COMPANY LIMITED; RE I.U.E.C., LOCAL 50	(Apr.) 497
Remedies - Construction Industry - Damages - Related Employer - Board declaring that respondent companies be treated as one employer for purposes of the <i>Act</i> and not limiting retrospective effect of the declaration - Board also directing that second respondent pay union the unsatisfied damages, if any, arising out of a damages award made 7 months earlier against first respondent by another panel of the Board in a section 126 proceeding	
GOLDEN ARM FLOORING INC., R.R. PROJECTS INC.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27 CJA	(June) 731
Remedies - Construction Industry - Related Employer - Parties agreeing that legal requirements for single employer declaration present - Whether, in view of conduct of employees or union's business representative, Board should exercise its discretion to issue declaration -	

Board making section 1(4) declaration, but limiting its effect to those commercial activities or contracts entered into after receipt of section 1(4) application

JARRETT CONSTRUCTION LTD. AND JARRETT COMMERCIAL CONTRACT-
ING; RE C.J.A., LOCAL 27..... (May) 586

Remedies - Damages - Discharge - Health and Safety - Complainant claiming damages for mental distress due to unlawful discharge - Medical reports from psychiatrist and family doctor submitted in support of claim - Board awarding \$500 in damages for mental distress - Board also directing employer to pay complainant's dental claim and vacation pay

WHITLER INDUSTRIES LIMITED; RE WADE DENNIS PROCTOR..... (July) 875

Remedies - Damages - Unfair Labour Practice - Board earlier directing reinstatement of grievor with compensation - Parties unable to resolve matter of compensation - Employer alleging failure to mitigate - Although some area employers had job openings in relevant period and someone in grievor's position could have tried harder to secure employment, Board satisfied that grievor made reasonable efforts to mitigate his losses - Employer directed to fully compensate grievor

PETER GORMAN AND SONS (WHOLESALE) LTD.; RE U.F.C.W., AFL,
CIO, CLC..... (Nov.) 1209

Remedies - Discharge - Duty of Fair Representation - Unfair Labour Practice - Union acknowledging that it violated its duty of fair representation in relation to the complainant's discharge grievance - Parties agreeing that grievance be submitted for arbitration and that Board remained seized on issue of union's liability for damages which may be awarded - Board directing that union and complainant jointly select counsel and that company, union and complainant mutually agree upon single arbitrator - Board declining to give complainant sole carriage with respect to arbitration

BRUCE REILLY; RE THE U.S.W.A.; RE GSW INC..... (July) 820

Remedies - Duty of Fair Referral - Duty of Fair Representation - Unfair Labour Practice - Complainant alleging that union violated the *Act* in removing him from his position in March 1991 and in the processes followed by the union thereafter - Union conceding that complainant had right to take his case concerning his removal to general membership for final decision - Board determining that union acted in arbitrary manner in refusing to allow complainant to present his request to remain in his position to membership for a vote - Board directing union to allow complainant to place his case before membership for its decision - Union also directed to notify all members in advance that the issue is to go before membership, to post Board's decision in the union's office and to provide copies to those members requesting it

PETER GALIATSOS; RE I.A.T.S.E., LOCAL 173; RE FAMOUS
PLAYERS INC. (June) 714

Remedies - Duty to Bargain in Good Faith - Lock-Out - Unfair Labour Practice - Employer agreeing to voluntarily recognize union at new location so long as union prepared to enter into separate collective agreement for that location - Union rejecting employer position and filing complaint at Board - Board finding and declaring that existing collective agreement encompassing new location and that staffing and subsequent operation of new location governed by collective agreement - Board directing that any continuing dispute regarding application of agreement be determined through arbitration and directing parties to waive time limits - Board also finding that employer breached its duty to bargain in good faith in preceding round of negotiations by passing on incomplete and misleading information regarding relocation of employer operations

UNION CARBIDE CANADA LIMITED; RE ENERGY AND CHEMICAL WORK-
ERS UNION, LOCAL 593..... (May) 645

- Remedies - Sale of a Business - Unfair Labour Practice - Nursing home's nurses represented by ONA - Metro Toronto's employees represented by CUPE in all-employee unit - Metro Toronto purchasing nursing home - Board observing that in two-union intermingling situations, it may give less weight to pre-existing status quo and employee preferences, and exhibit more concern about problems of fragmentation and establishment of sensible bargaining arrangements in new business context - Board declining to preserve nurses' bargaining unit at nursing home and declaring that CUPE represents the nursing home's employees, including the former ONA nurses - Board remaining seized with respect to effective date of declaration - Board dismissing unfair labour practice complaint based on failure of employer to treat new hires and transferees as coming under the ONA collective agreement
- MUNICIPALITY OF METROPOLITAN TORONTO, THE; RE O.N.A. AND S.E.I.U., LOCAL 204; RE C.U.P.E., LOCAL 79 (Mar.) 315
- Representation Vote - Certification - Settlement - Unfair Labour Practice - Parties' settlement of certification application and related unfair labour practice complaint requiring Board to conduct representation vote - Board seeing no reason not to act on that agreement of the parties - Board directing representation vote
- WEATHERSTRONG BUILDING PRODUCTS LTD.; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Jan.) 100
- Representation Vote - Abandonment - Certification - Union making displacement application - Incumbent union notifying Board that it wishes to abandon bargaining rights - Representation vote not required in circumstances - Certificate issuing
- CARA OPERATIONS LIMITED; RE CANADIAN UNION OF RESTAURANT AND RELATED EMPLOYEES (Feb.) 130
- Representation Vote - Adjournment - Termination - Following officer meeting and agreement to conduct vote on certain date, employer seeking adjournment of vote on ground that particular employee would be absent for medical reasons on the day of the vote - As alternative, employer requesting that employee be permitted to vote by proxy or to submit mail ballot or to cast ballot on return to work - Board denying employer requests - Representation vote resulting in tie - Board denying employer's renewed request that employee who missed vote be allowed to cast ballot - Board noting that parties had full opportunity for input into details of vote arrangements in advance of vote - Board explaining concerns surrounding proxy or mail balloting - Application dismissed
- PEACOCK LUMBER LTD.; RE KENNETH W. LYON; RE R.W.D.S.U. AFL:CIO:CLC (Oct.) 1093
- Representation Vote - Certification - Charges - Evidence - Four employees who had not been on voters' list casting ballots - Employees arguing that they properly belong in bargaining unit and that their ballots should be counted - Board ruling that their segregated ballots not be counted and that it would not inquire further into their duties and responsibilities - Board permitting union to call evidence of handwriting expert as part of defence to forgery allegation in non-pay/non-sign inquiry - Board determining that card submitted by union reliable - Board commenting on procedure where non-pay/non-sign allegations raised subsequent to representation vote - Certificate issuing
- MOORE CORPORATION LIMITED; RE GRAPHIC COMMUNICATION INTERNATIONAL UNION, LOCAL N-1; RE GROUP OF EMPLOYEES (May) 614
- Representation Vote - Certification - Construction Industry - Pre-Hearing Vote - Practice and Procedure - Board reconsidering its customary practice with respect to voter eligibility in construction industry certification applications and concluding that dual voter eligibility dates not appropriate - Board determining that in construction industry certification appli-

cations, those eligible to vote will be those at work in the bargaining unit ("voting constituency" in pre-hearing applications) on the application date

CRETE FLOORING GROUP LIMITED; RE L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 (July) 792

Representation Vote - Certification - Construction Industry - Pre-Hearing Vote - Reconsideration - Unfair Labour Practice - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in *Crete Flooring* case - Nothing in *Crete Flooring* suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed

METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 (Sept.) 1007

Representation Vote - Charges - Evidence - Intimidation and Coercion - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert evidence on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that conduct of union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing

POLYTECH COATINGS LIMITED; RE C.A.W.; RE GROUP OF EMPLOYEES (Mar.) 362

Representation Vote - Charges - Evidence - Intimidation and Coercion - Judicial Review - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking judicial review on grounds that Board answered wrong question, applied wrong legal test and made unreasonable findings of fact - Application for judicial review dismissed by Divisional Court

POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB (June) 766

Representation Vote - Charges - Evidence - Intimidation and Coercion - Judicial Review - Stay - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking stay of union's certification pending hearing of judicial review application by Divisional Court - Stay application dismissed on consent

POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB (May) 662

Representation Vote - Construction Industry - Termination - Board applying reasoning of *Crete Flooring Group* decision to termination representation votes in construction industry -

- Board determining that in construction industry termination applications, those eligible to vote will be those at work in the bargaining unit on the application date
- WALDEN ROOFING & SHEET METAL CO. LIMITED; RE DONALD FEENER; RE S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562(Aug.) 971
- Sale of a Business - "UF" purchasing "A" and subsequently transferring certain machinery, production and employees from UF's location to A's location - Employees of UF and A represented by different unions - UF planning total integration of two companies at location of A, but plans put on hold - Board finding intermingling and ordering representation vote to determine which of two trade unions should continue to hold bargaining rights
- UNION FELT PRODUCTS (ONTARIO) LTD., ALMAC PRODUCTS INC., AND ALMAC INDUSTRIES INC.; RE THE CANADIAN TEXTILE AND CHEMICAL UNION; RE U.S.W.A., UPHOLSTERING & ALLIED INDUSTRIES DIVISION (U.D.) (July) 871
- Sale of a Business - Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Board applying *Lorne's Electric* case and finding that predecessor employer bound to Carpenters' provincial collective agreement at time of sale - Delay in asserting bargaining rights not affecting remedies under section 64 of the *Act* - Board declaring successor bound by predecessor's collective agreement - Board remaining seized with respect to remaining issues arising under grievance
- BANCLIFFE CONTRACTING & CONSTRUCTION, 203733 ONTARIO INC. (FORMERLY KNOWN AS BANCLIFFE CONTRACTING & CONSTRUCTION LIMITED) NOW OPERATING AS BANCLIFFE INTERIORS, SHELDON ASSOCIATES LTD. OPERATING AS; RE C.J.A., LOCAL 27 (Sept.) 990
- Sale of a Business - Adjournment - Practice and Procedure - Stay - Unfair Labour Practice - Whether order issued by Quebec Superior Court under the *Companies' Creditors Arrangement Act* (C.C.A.A.) staying proceedings before the Board - Board determining that order staying proceeding against first respondent - Second respondent not entitled to relief under C.C.A.A., but Board viewing it as impossible to disentangle proceedings to permit matter to continue against second respondent and to be stayed against first respondent - Complainant given option to await expiration of stay order, to obtain modification of the stay or to withdraw complaint and claim for relief against first respondent
- STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS LOCAL UNION NO. 419 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE R.W.S.D.U., AFL CIO CLC, AND ITS LOCAL 414 (July) 860
- Sale of a Business - Board determining that acquisition by 'S' of certain assets of 'P' at plant near Bradford and assignment to S of P's lease for those premises constituting sale of a business - Board declaring that S bound by union's collective agreement with P
- PAPERBOARD INDUSTRIES CORPORATION AND SPECIALIZED PACKAGING PRODUCTS LTD.; RE C.P.U., LOCAL 1150(Aug.) 946
- Sale of a Business - Construction Industry - Related Employer - Woodwork company sold by "F" going bankrupt - "F" incorporating new company, purchasing some of bankrupt company's equipment and carrying on substantially same business - Board finding "F" to be "key person" - Related employer declaration issuing - Board also finding sale of a business and declaring that union has bargaining rights for employees of successor employer
- ECONOMY STORE FIXTURES LIMITED AND FLAIR WOODWORKING LTD.; RE CARPENTERS AND ALLIED WORKERS, LOCAL 27, C.J.A.; RE CANADIAN WOODWORK MANUFACTURERS ASSOCIATION (May) 575

Sale of a Business - Evidence - Practice and Procedure - Witness - Board not persuaded that statutory duty under sub-section 64(13) satisfied through production by only one of the respondents of a witness to testify with respect to the allegation that a sale occurred - Second respondent directed to adduce, through *viva voce* testimony at the hearing, "all facts within their knowledge that are material to the allegation"

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS' UNION, LOCAL 419; RE R.W.D.S.U., AFL CIO CLC AND ITS LOCAL 414..... (Feb.)

223

Sale of a Business - Related Employer - Union asserting that non-profit community centre and regional municipality carrying on related activities in provision of social services under common control or direction - Union submitting, in alternative, that there had been transfer of administration and delivery of social services constituting sale of a business - Municipality's assistance and participation not translating into control or direction - No transfer - Applications dismissed

PINECREST-QUEENSWAY HEALTH AND COMMUNITY SERVICES, REGIONAL MUNICIPALITY OF OTTAWA-CARLETON AND; RE OTTAWA-CARLETON PUBLIC EMPLOYEES UNION, LOCAL 503 (Nov.)

1211

Sale of a Business - Remedies - Unfair Labour Practice - Nursing home's nurses represented by ONA - Metro Toronto's employees represented by CUPE in all-employee unit - Metro Toronto purchasing nursing home - Board observing that in two-union intermingling situations, it may give less weight to pre-existing status quo and employee preferences, and exhibit more concern about problems of fragmentation and establishment of sensible bargaining arrangements in new business context - Board declining to preserve nurses' bargaining unit at nursing home and declaring that CUPE represents the nursing home's employees, including the former ONA nurses - Board remaining seized with respect to effective date of declaration - Board dismissing unfair labour practice complaint based on failure of employer to treat new hires and transferees as coming under the ONA collective agreement

MUNICIPALITY OF METROPOLITAN TORONTO, THE; RE O.N.A. AND S.E.I.U., LOCAL 204; RE C.U.P.E., LOCAL 79 (Mar.)

315

Sector Determination - Construction Industry - Construction Industry Grievance - Evidence - Practice and Procedure - Parties disputing scope of work and scope of evidence relevant to sector determination - Board deciding that parties free to rely on industry practice throughout the province in regards to employee relations on the type of work in dispute - Subject of sector determination identified as work related to installation of large underground concrete storage tanks associated with water treatment purposes

MATTHEWS CONTRACTING INC.; RE C.J.A., LOCAL 18; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Oct.)

1088

Settlement - Construction Industry - Construction Industry Grievance - Labour-Management Relations Committee hearing grievance at Step 3 of grievance procedure and issuing decision - Union submitting that matter in dispute thereby settled pursuant to grievance procedure set out in collective agreement - Board upholding union's preliminary motion, concluding that grievance settled, and directing employer to comply with terms of settlement

E.S. FOX LIMITED; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 1007 (Jan.)

29

Settlement - Certification - Representation Vote - Unfair Labour Practice - Parties' settlement of certification application and related unfair labour practice complaint requiring Board to

conduct representation vote - Board seeing no reason not to act on that agreement of the parties - Board directing representation vote

WEATHERSTRONG BUILDING PRODUCTS LTD.; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Jan.)

100

Settlement - Unfair Labour practice - Complainant filing identical complaint to one filed almost one year earlier - Earlier complaint withdrawn in circumstances which respondents submitted amounted to settlement - Board determining that earlier complaint had been settled and, accordingly, dismissing subsequent complaint

H. JOHN BARNES; RE L.I.U.N.A., LOCAL 527, AND BERNARDINO CARROZZI (June)

668

Stay - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for stay of Board decision pending judicial review - Stay application dismissed by Divisional Court for failing to establish strong *prima facie* case

ELLIS-DON LIMITED; RE THE OLRB AND I.B.E.W., LOCAL 894 (June)

764

Stay - Adjournment - Practice and Procedure - Sale of a Business - Unfair Labour Practice - Whether order issued by Quebec Superior Court under the *Companies' Creditors Arrangement Act* (C.C.A.A.) staying proceedings before the Board - Board determining that order staying proceeding against first respondent - Second respondent not entitled to relief under C.C.A.A., but Board viewing it as impossible to disentangle proceedings to permit matter to continue against second respondent and to be stayed against first respondent - Complainant given option to await expiration of stay order, to obtain modification of the stay or to withdraw complaint and claim for relief against first respondent

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS LOCAL UNION NO. 419 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE R.W.S.D.U., AFL CIO CLC, AND ITS LOCAL 414 (July)

860

Stay - Charges - Evidence - Intimidation and Coercion - Judicial Review - Representation Vote - Employer alleging "climate of fear" in which true wishes of employees unlikely to have been revealed by representation vote - Board allowing employer to call expert witness on Sikh culture and religion but finding his evidence to be of little assistance - Board declining to give probative weight to hearsay evidence - Evidence not warranting finding that union organizers and supporters outside voting area intimidatory, coercive or otherwise preclusive of vote being reliable expression of employees' true wishes - Request for new vote denied - Certificate issuing - Employer seeking stay of union's certification pending hearing of judicial review application by Divisional Court - Stay application dismissed on consent

POLYTECH COATINGS LIMITED; RE CAW-CANADA AND OLRB (May)

662

Strike - Construction Industry - Unfair Labour Practice - Teamsters complaining that, by setting up picket line at excavation site, members of respondent Aggregate Haulers Benevolent Association performing act which they knew would lead employees at site to engage in

unlawful strike - Evidence disclosing that picketers talking to some drivers and delaying some for periods between 3 to 10 minutes, but Board hearing no evidence that operation of employer disrupted - Board hearing no evidence as to content of any conversations with drivers - Board ruling that evidence not making out necessary components of illegality - Application for relief under section 94 of the Act dismissed - Unfair labour practice complaint based on same allegations considered adjourned sine die

ONTARIO AGGREGATE HAULERS BENEVOLENT ASSOCIATION AND LOR-ENZO BORRELLI, AND ANGELO NATALE; RE TEAMSTERS, LOCAL 230, READY MIX, BUILDING, SUPPLY, HYDRO & CONSTRUCTION DRIVERS, WAREHOUSEMEN & HELPERS OF THE TEAMSTERS UNION (Apr.) 489

Termination - Charges - Fraud - Reconsideration - Employee alleging that union obtained its certificate by fraud and that bargaining rights should be terminated - Board determining that certain allegations not contributing to *prima facie* case - Other allegations dismissed on basis of lack of particularity and delay - Reconsideration application and termination application dismissed

CAMBRIDGE REPORTER; RE DIRK KOEHLER, FOR THE EMPLOYEES OF THE CAMBRIDGE REPORTER; RE THE SOUTHERN ONTARIO NEWSPAPER GUILD UNIT, CAMBRIDGE, ONT. (LOCAL 87) (Oct.) 1059

Termination - Adjournment - Representation Vote - Following officer meeting and agreement to conduct vote on certain date, employer seeking adjournment of vote on ground that particular employee would be absent for medical reasons on the day of the vote - As alternative, employer requesting that employee be permitted to vote by proxy or to submit mail ballot or to cast ballot on return to work - Board denying employer requests - Representation vote resulting in tie - Board denying employer's renewed request that employee who missed vote be allowed to cast ballot - Board noting that parties had full opportunity for input into details of vote arrangements in advance of vote - Board explaining concerns surrounding proxy or mail balloting - Application dismissed

PEACOCK LUMBER LTD.; RE KENNETH W. LYON; RE R.W.D.S.U. AFL:CIO:CLC (Oct.) 1093

Termination - Applicant making second termination application in two months - Board dismissing earlier application because less than forty-five per cent of employees had signed statement of desire in support of it - Union asking Board to dismiss second application with a bar - Board satisfied that representation issue not truly determined in first application - Union's motion dismissed by Board

CARA OPERATIONS LIMITED; RE ROSETTA LUCIANI; RE H.E.R.E., LOCAL 75 OF THE H.E.R.E. (Mar.) 295

Termination - Bargaining Unit - Construction Industry - Applicant and supporting employees not members of the union and not hired through the hiring hall - Whether employees bringing the termination application entitled to support and bring the application - Board regarding reasoning in *April Waterproofing* decision applicable - Application dismissed

KEN ACTON PLUMBING & HEATING INC.; RE PAUL MCCONACHIE AND U.A., LOCAL 27 (May) 604

Termination - Construction Industry - Board considering termination application in circumstance where at all material times there has been, and for the foreseeable future there is likely to be, only one employee in the bargaining unit - Board observing that it makes no sense to send Board Officer to Owen Sound, with ballot box, to receive one ballot - Parties agreeing that Board send applicant a ballot in the usual form asking him whether he wishes to con-

tinue to be represented by the union - Applicant to return ballot to Board by registered mail on specified date

FLUKER ELECTRICAL MECHANICAL CONTRACTORS, DIVISION OF H. FLUKER CONSULTANTS INC.; RE MICHAEL PORTER; RE I.B.E.W., I.B.E.W., LOCAL 804 (Apr.)

458

Termination - Construction Industry - Natural Justice - Practice and Procedure - Reconsideration - Applicant filing termination application after terminal date of earlier application brought by different applicant - Earlier application still pending before the Board - Board assigning terminal date and hearing date to subsequent application but, upon discovering that earlier application had been filed, Board cancelling hearing - Parties' attention drawn to s. 105(3) of the *Act* - Applicant seeking reconsideration - Board rejecting submission that rules of natural justice requiring that parties be afforded opportunity to make submissions before Board exercises discretion pursuant to s.105(3) - Board affirming decision to defer subsequent application pending determination of earlier application - Reconsideration request denied

A & G METRO ROOFING LTD.; RE SIMONE IAQUINTA; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS CONFERENCE, S.M.W. AND S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562..... (July)

769

Termination - Construction Industry - Parties - Union challenging standing of named applicant to bring application and arguing that application a nullity which may not be amended - Since named applicant not at work in bargaining unit on date of application, named applicant without status to bring application - Board, however, questioning utility of technical approach based on existence of "cause of action" and applicability of that approach in labour relations context - Board exercising its discretion under Rules of Procedure to add named petitioners as party applicants

INDUSTRIAL METAL FABRICATORS LIMITED; RE STEPHEN MYERS, RE S.M.W., THE ONTARIO SHEET METAL WORKERS' CONFERENCE AND AFFILIATED BARGAINING AGENTS, LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539, 562 (Oct.)

1083

Termination - Construction Industry - Representation Vote - Board applying reasoning of *Crete Flooring Group* decision to termination representation votes in construction industry - Board determining that in construction industry termination applications, those eligible to vote will be those at work in the bargaining unit on the application date

WALDEN ROOFING & SHEET METAL CO. LIMITED; RE DONALD FEENER; RE S.M.W. LOCALS 30, 47, 235, 269, 392, 397, 473, 504, 537, 539 AND 562 (Aug.)

971

Termination - Employer requesting that union terminate bargaining rights on basis that union did not give notice to bargain within 60 days of certification - Board finding delay in giving notice not lengthy and that explanation given by union indicating inadvertence rather than intention to sleep on its rights - Employer suffering no prejudice from union's conduct - Application dismissed

HARC INCORPORATED; RE O.P.S.E.U. (Aug.)

938

Termination - Petition - Local union officials circulating petition in support of termination application - Although many signatures on petition obtained on company premises during working hours, circumstances not such that employees would reasonably perceive that petition supported by management or that names of employees who declined to sign would become known to management - Collective agreement indicating that it was entered between employer and national union and its local - Board determining that petition naming only

national union not defective - Board satisfied that petition voluntary and directing representation vote

DOMTAR INC.; RE STEPHEN STACEY AND FRANK KING; RE THE C.P.U. AND ITS LOCAL 934 (June) 682

Termination - Petition - Only one person in bargaining unit for purpose of the count and that person signing petition - Board determining that employer interfered with origination of termination application and that petition not voluntary expression of employee wishes - Application dismissed

BILL BAILEY OF BELLEVILLE LIMITED; RE ROBERT HARRY MACKLIN; RE U.A. (June) 673

Termination - Petition - Union certified pursuant to section 8 of the *Act* in 1989 - Board noting need to be sensitive to lingering effects of egregious unfair labour practices on likelihood of employees voluntarily seeking to decertify union at first available opportunity thereafter - In all the circumstances, Board concluding that petition not voluntary - Application dismissed

ROYCE DUPONT POULTRY PACKERS; RE ELIZABETH GIERASIMCZUK; RE U.F.C.W., LOCAL 175 (June) 760

Termination - Timeliness - Board determining that under present wording of the *Act* and the Rules, an application for declaration terminating bargaining rights cannot validly be made or filed via facsimile transmission - Board ruling that application in this case made when six copies of completed Form 17 application delivered to Board by hand

MACMILLAN BATHURST INC.; RE REG BELL; RE C.P.U., LOCAL 1199 (Jan.) 41

Timeliness - Certification - Change in Working Conditions - Collective Agreement - Construction Industry - Employer Support - Unfair Labour Practice - Board rejecting applicant union's argument that collective agreement between employer and incumbent union void - Board holding that signing collective agreement not violating statutory freeze, nor constituting employer support within meaning of section 49 of the *Act* - Certification application dismissed as being untimely

STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE C.L.A.C. (Sept.) 1049

Timeliness - Certification - Collective Agreement - Whether collective agreement in effect between incumbent union and employer and, consequently, operating to bar instant certification application - Board not satisfied either that bargaining had come to a complete end, or that all of the precise terms of the collective agreement asserted by incumbent union can be ascertained - Union's objection with respect to collective agreement bar dismissed and Board directing that representation vote be taken

MULLER'S MEATS LIMITED; RE MULLER'S MEATS EMPLOYEES ASSOCIATION; RE R.W.D.S.U. AFL:CIO:CLC (Aug.) 942

Timeliness - Certification - *Hospital Labour Disputes Arbitration Act* - Interest Arbitration - Pre-Hearing Vote - Interest arbitration award on 'central issues' issued in December 1991 - Award establishing term of collective agreement to be from April 1, 1990 to March 31, 1992 - Rival union making displacement certification application in February 1992 - 'Local issues' arbitration award still outstanding and collective agreement for 1990-92 period not yet made - Board finding displacement application timely under HLDAA as falling within 60

days preceding March 31, 1992 or, alternatively, within 90 days after 'central issues' award - Board directing that ballots cast in pre-hearing vote be counted

CHATEAU GARDENS QUEENS, MERCEDES CORPORATION C.O.B. AS; RE C.L.A.C.; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220 (Aug.) 906

Timeliness - Certification - Pre-Hearing Vote - Respondent and intervener submitting that no pre-hearing vote ought to be directed because application untimely - Respondent and intervener signing new collective agreement following recent decision of the Board granting joint request for early termination of collective agreement - Applicant seeking reconsideration of Board's decision granting early termination - Board directing that pre-hearing representation vote be taken and that ballots be sealed until parties have been given full opportunity to present their evidence and make their submissions

LEDCOR INDUSTRIES LIMITED; RE L.I.U.N.A., LOCAL 183; RE C.L.A.C. . (Feb.) 190

Timeliness - Termination - Board determining that under present wording of the Act and the Rules, an application for declaration terminating bargaining rights cannot validly be made or filed via facsimile transmission - Board ruling that application in this case made when six copies of completed Form 17 application delivered to Board by hand

MACMILLAN BATHURST INC.; RE REG BELL; RE C.P.U., LOCAL 1199 (Jan.) 41

Trade Union - Certification - Employees not meeting eligibility requirements of union's constitution - Union not having established practice of admitting persons to membership without regard to eligibility requirements of constitution - Application dismissed

ST. CATHARINES HYDRO ELECTRIC COMMISSION; RE CAN WORKERS FEDERAL UNION, LOCAL 354, CANADIAN LABOUR CONGRESS; RE I.B.E.W. (May) 638

Trade Union Status - Certification - Employer Support - Board satisfied that employer participated in formation and administration of applicant union and contributed support to it - Section 13 of the Act operating to bar certification - Certification application dismissed

AIRLIFT LIMOUSINE SERVICES LIMITED; RE THE CANADIAN ALLIANCE OF AIRPORT TRANSPORTATION WORKERS; RE TEAMSTERS' UNION, LOCAL UNION 938 (Sept.) 985

Trade Union Status - Certification - Practice and Procedure - Employer not challenging trade union status and having no objection to Board relying on documents filed by applicant in respect of status issue - Board satisfied that applicant a trade union within meaning of the Act - Certificate issuing

CANADA SECURITY CORPORATION; RE CANADIAN SECURITY UNION (Feb.) 129

Trusteeship - Practice and Procedure - Board receiving April 1992 letter from General Secretary of International Union stating that local placed under trusteeship in April 1991 - Board treating letter as request under s. 84(2) of the Act to extend terms of trusteeship - Board directing International Union to bring its request to the attention of Local members - Members to have six weeks to advise Board in writing whether or not they oppose International's request

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS; RE B.S.O.I.W., SHOPMEN'S LOCAL UNION 834, TORONTO, ONTARIO (May) 584

Unfair Labour Practice - Collective Agreement - Construction Industry - Duty of Fair Representation - Employer and employee bargaining agencies for "electrical-trade" portion of ICI sector of construction industry settling renewal of collective agreement expiring April 30,

1992 - Settlement made on February 14, 1992 also amending existing ICI agreement ten weeks prior to its April 30th expiry date - Whether the two e.b.a.'s without jurisdiction to amend existing provincial agreement - Whether employer bargaining agency breaching duty of fair representation - Whether whole settlement should be set aside - Complaint brought by Sarnia contractors dismissed

ELECTRICAL CONTRACTORS ASSOCIATION OF SARNIA; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO, I.B.E.W., AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO (Apr.)

435

Unfair Labour Practice - Adjournment - Duty of Fair Representation - Complainants alleging that process leading to Pay Equity Plan with employer unfair and biased against certain employees in computing and technical classifications - Board denying union's motion to dismiss complaint for failure to plead *prima facie* case - Board also dismissing complainants' motion to adjourn pending disposition of related court proceeding

JOHN HUNTLEY, PEGGY NG, ROD POTTER, MAJELLA POWER-O'CONNOR, LANCE RANKIN, ERIKS RUGELIS, JAMIE SPENCE, VERONICA TIMM, CARLOS M. MARQUES, JOHN G. CURRELL, TONY D'AGOSTINO AND DAVIE COLLIER-BROWN; RE THE YORK UNIVERSITY STAFF ASSOCIATION (Nov.)

1193

Unfair Labour Practice - Adjournment - Practice and Procedure - Sale of a Business - Stay - Whether order issued by Quebec Superior Court under the *Companies' Creditors Arrangement Act* (C.C.A.A.) staying proceedings before the Board - Board determining that order staying proceeding against first respondent - Second respondent not entitled to relief under C.C.A.A., but Board viewing it as impossible to disentangle proceedings to permit matter to continue against second respondent and to be stayed against first respondent - Complainant given option to await expiration of stay order, to obtain modification of the stay or to withdraw complaint and claim for relief against first respondent

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS LOCAL UNION NO. 419 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; RE R.W.S.D.U., AFL CIO CLC, AND ITS LOCAL 414 (July)

860

Unfair Labour Practice - Adjournment - Practice and Procedure - Union counsel requesting adjournment because he had only been retained the day before - In the circumstances, Board not satisfied that last-minute change of counsel warranting adjournment - Board concluding that neither employer's decision to change grievor's shift, nor its provision of written instructions to grievor improperly motivated - Complaint dismissed

CYBERMEDIX HEALTH SERVICES LIMITED; RE O.P.S.E.U. (Mar.)

308

Unfair Labour Practice - Bargaining Unit - Duty to Bargain in Good Faith - Remedies - Voluntary Recognition - Employer seeking recognition clause different from one found in voluntary recognition agreement - Board finding that parties had bargained to impasse and that employer's insistence on pressing its position on bargaining unit constituting bargaining in bad faith - Board making cease and desist direction, but declining to order payment of damages

WELLINGTON COUNTY SEPARATE SCHOOL BOARD, THE; RE WELLINGTON SEPARATE SUPPORT STAFF ASSOCIATION (Oct.)

1128

Unfair Labour Practice - Certification - Certification Where Act Contravened - Certification hearing held in June, union's unfair labour practice complaint made in July, and request for relief under section 8 of the Act made in August - Allegations supporting request under sec-

tion 8 alleged to have occurred prior to June - Board deciding that union's delay disenti-
tling it from relying on section 8 of the Act in support of certification application

AMORIM ENTERPRISES LTD.; RE H.E.R.E., LOCAL 75; RE GROUP OF
EMPLOYEES..... (Feb.)

123

Unfair Labour Practice - Certification - Certification Where Act Contravened - Construction
Industry - Discharge - Discharge for Union Activity - Employer motivated by anti-union
animus in discharging one employee and provoking second employee into quitting - Union
demonstrating adequate support for collective bargaining, but true wishes of employees not
likely to be ascertained in representation vote - Certificates issuing

WM. J. DAVIDSON ELECTRIC INC.; RE I.B.E.W., LOCAL 105 (Jan.)

101

Unfair Labour Practice - Certification - Certification Where Act Contravened - Construction
Industry - Employee - Employer - Dependent Contractor - Discharge - Electrical sub-con-
tractor going bankrupt and its employees continuing to work on project - Union filing certi-
fication application and electricians subsequently laid off - Whether electricians engaged as
independent contractors - Whether engaged by project superintendent or by general con-
tractor - Whether lay-offs improperly motivated - Board finding electricians to be depen-
dent contractors engaged by general contractor and that subsequent lay-offs unrelated to
certification application - Certificates issuing

GORF CONTRACTING LTD.; RE I.B.E.W., LOCAL UNION 1687 (July)

800

Unfair Labour Practice - Certification - Certification Where Act Contravened - Discharge - Dis-
charge for Union Activity - Remedies - Discharges not motivated solely by legitimate busi-
ness reasons - Reinstatement appropriate even where there is successor employer - Board
issuing certificate pursuant to section 8 of the Act

BEAVER LUMBER, WENTWORTH BEAVER LIMITED C.O.B. AS; RE
R.W.D.S.U., AFL:CIO:CLC (May)

553

Unfair Labour Practice - Certification - Certification Where Act Contravened - Discharge - Prac-
tice and Procedure - Failure to secure employees' written authorization not precluding
union from claiming relief on behalf of those employees - Board finding employee's suspen-
sion, certain demotions and lay-offs motivated by anti-union animus - Employer harass-
ment and warning letter directing in-plant organizer to cease collecting cards on company
property, in circumstances, violating the Act - Various employer statements at employee
meetings also violating the Act - Board issuing certificate pursuant to section 8 of the Act

ROYAL HOMES LIMITED; RE C.J.A., LOCAL 27; RE GROUP OF EMPLOYEES;
RE C.J.A., LOCAL 3054..... (Feb.)

199

Unfair Labour Practice - Certification - Change in Working Conditions - Collective Agreement -
Construction Industry - Employer Support - Timeliness - Board rejecting applicant union's
argument that collective agreement between employer and incumbent union void - Board
holding that signing collective agreement not violating statutory freeze, nor constituting
employer support within meaning of section 49 of the Act - Certification application dis-
missed as being untimely

STEPHENS & RANKIN INC.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT
COUNCIL; RE C.L.A.C. (Sept.)

1049

Unfair Labour Practice - Certification - Construction Industry - Employer - Evidence - Practice
and Procedure - Board concerned that procedural skirmishes concerning production may
deflect the parties' focus from substantive issues and unnecessarily prolong the hearing -
Board directing all parties to identify and list all documents upon which they intend to rely

in respect of all issues, and to file photocopies of such documents with opposite counsel and with the Board no later than one week prior to next hearing date

GRANT DEVELOPMENT CORPORATION AND/OR PIC HERON BAY INDIAN BAND; RE L.I.U.N.A., LOCAL 607 (Feb.) 174

Unfair Labour Practice - Certification - Construction Industry - Pre-Hearing Vote - Representation Vote - Reconsideration - Union seeking reconsideration of decision dismissing complaint on ground that Board improperly went behind grievance settlement and drew insupportable inference fatal to its position - Request for reconsideration dismissed - Union also seeking reconsideration of decision in certification application regarding voter eligibility on basis of new Board policy described in *Crete Flooring* case - Nothing in *Crete Flooring* suggesting that new practice will be applied to certification applications in which representation vote has already been taken - Request for reconsideration dismissed

METRO CONCRETE FLOORS (1990) INC. AND L.I.U.N.A., LOCAL 506; RE O.P.C.M., LOCAL 598 (Sept.) 1007

Unfair Labour Practice - Certification - Discharge - Discharge for Union Activity - Membership Evidence - Petition - Board not satisfied that employer's reasons for employee's lay-off entirely free of improper motivation - Board not satisfied that petitions representing voluntary expressions of employee wishes - Board re-affirming that it does not treat revocation, resignation or withdrawal of membership as cancelling or invalidating membership card for purposes of Board's assessment under section 7 of the Act - Allegation that union refused to return petitioner's card, even if true, not creating defect in the membership evidence - Certificate issuing

HAVLIK TECHNOLOGIES INC., (WILLIAMS MACHINES DIVISION); RE C.A.W.; RE GROUP OF EMPLOYEES (Apr.) 468

Unfair Labour Practice - Certification - Parties - Practice and Procedure - Carpenters' union applying for certification and filing unfair labour practice complaint - Labourers' union seeking to intervene on ground that remedy sought under complaint would have effect of displacing member of Labourers - Labourers also submitting that Board finding might affect outcome of grievance earlier filed by Labourers - Labourers' interest contingent on various factors - Board denying Labourers standing on adjudication of merits of complaint - Labourers, however, to be given notice of any subsequent hearing to deal with remedy and to have opportunity to show why they should be granted standing for that hearing

AROSAN ENTERPRISES LIMITED; RE C.J.A., LOCAL 93 (Jan.) 10

Unfair Labour Practice - Certification - Petition - Complaint in respect of certain lay-offs, letters from the company to the employees and incident regarding employee wearing union pin allowed - Complaint in all other respects dismissed - Petition held not a reliable indication of voluntary change of heart - Certificate issuing

THERMOGENICS INC.; RE B.B.F.; RE GROUP OF EMPLOYEES (Feb.) 224

Unfair Labour Practice - Certification - Practice and Procedure - Union seeking to withdraw certification application and unfair labour practice complaint - Employer urging that unfair labour practice complaint be dismissed "with prejudice" and that certification application be dismissed with endorsement reserving employer's right to argue that there should be a bar if the union filed a new application - Objectors asking Board to impose immediate six-month bar - Board considering rationale for imposing bar in certain cases and reviewing practical distinction between "withdrawal" and "dismissal" of Board proceedings - Certification application dismissed without bar - Complaint withdrawn

R.J.R. MACDONALD INC.; RE B.C.T. AFL-CIO-CLC; RE GROUP OF EMPLOYEES (Apr.) 503

- Unfair Labour Practice - Certification - Representation Vote - Settlement - Parties' settlement of certification application and related unfair labour practice complaint requiring Board to conduct representation vote - Board seeing no reason not to act on that agreement of the parties - Board directing representation vote
- WEATHERSTRONG BUILDING PRODUCTS LTD.; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Jan.) 100
- Unfair Labour Practice - Change in Working Condition - Board finding that implementation of revised policy regarding sales commissions on returns and account corrections violating "statutory freeze" - Employer directed to compensate bargaining unit members for all losses
- THE BRICK WAREHOUSE CORPORATION; RE R.W.D.S.U. AFL:CIO:CLC (Oct.) 118
- Unfair Labour Practice - Change in Working Conditions - *Hospital Labour Disputes Arbitration Act* - Board determining that employer's failure to pay "interval" wage increases during 1990 and 1991 violating the statutory "freeze" - Union's delay in making complaint, in the circumstances, not standing in the way of a Board finding and remedial order - Complaint upheld - Employer directed to implement the wage increase for 1990 and 1991 according to its established practice
- HARROWOOD SENIORS' COMMUNITY; RE C.U.P.E., LOCAL 3419..... (Feb.) 177
- Unfair Labour Practice - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Practice and Procedure - Board declining to defer Cement Masons' unfair labour practice complaint to jurisdictional dispute resolution procedure - Issue in complaint not appropriateness of work assignment, but motivation behind it - Board directing that mark-up grievance be joined for hearing with unfair labour practice complaint - Board declining to hear work assignment grievance so as to allow parties an opportunity to file jurisdictional dispute complaint with the Board or the Plan - Board allowing Cement Masons to amend unfair labour practice complaint to allege breach of s.93(14) - Board not determining Labourers strict legal interest in proceedings, but exercising its discretion to grant Labourers standing
- ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL, O.P.C.M., LOCAL 598; RE L.I.U.N.A., LOCAL 1059, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS (Jan.) 47
- Unfair Labour Practice - Construction Industry - Duty to Bargain in Good Faith - Whether union breaching the duty to bargain by insisting that there be one collective agreement and one seniority list for construction work and non-construction work in the elevator industry in the province, and by refusing Association's request that union sign the same non-ICI agreement it had signed with some individual employers - Whether subsequent collective agreement removing grounds for the complaint proceeding - Complaint dismissed
- NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION; RE I.U.E.C., LOCALS 50, 90 AND 96 (Mar.) 345
- Unfair Labour Practice - Construction Industry - Strike - Teamsters complaining that, by setting up picket line at excavation site, members of respondent Aggregate Haulers Benevolent Association performing act which they knew would lead employees at site to engage in unlawful strike - Evidence disclosing that picketers talking to some drivers and delaying some for periods between 3 to 10 minutes, but Board hearing no evidence that operation of employer disrupted - Board hearing no evidence as to content of any conversations with drivers - Board ruling that evidence not making out necessary components of illegality -

Application for relief under section 94 of the Act dismissed - Unfair labour practice complaint based on same allegations considered adjourned sine die

ONTARIO AGGREGATE HAULERS BENEVOLENT ASSOCIATION AND LORENZO BORRELLI, AND ANGELO NATALE; RE TEAMSTERS, LOCAL 230, READY MIX, BUILDING, SUPPLY, HYDRO & CONSTRUCTION DRIVERS, WAREHOUSEMEN & HELPERS OF THE TEAMSTERS UNION (Apr.)

489

Unfair Labour Practice - Damages - Remedies - Board earlier directing reinstatement of grievor with compensation - Parties unable to resolve matter of compensation - Employer alleging failure to mitigate - Although some area employers had job openings in relevant period and someone in grievor's position could have tried harder to secure employment, Board satisfied that grievor made reasonable efforts to mitigate his losses - Employer directed to fully compensate grievor

PETER GORMAN AND SONS (WHOLESALE) LTD.; RE U.F.C.W., AFL, CIO, CLC..... (Nov.)

1209

Unfair Labour Practice - Discharge - Discharge for Union Activity - Board not satisfied that employer's reasons for discharging grievor entirely free of improper motive - Evidence indicating that legitimate reasons co-existing with unlawful reasons - Complaint allowed - Reinstatement with compensation ordered

KAUTEX OF CANADA INC.; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW - CANADA)..... (Nov.)

1197

Unfair Labour Practice - Discharge - Duty of Fair Representation - Evidence - Practice and Procedure - Board declining to hear evidence of Labour Relations Officer's settlement endeavours - Employee hired on call-in basis subsequently discharged - Local union president having only brief and casual conversation with complainant after her discharge - Local president failing to respond to complainant's letter or to any of numerous telephone calls - Union demonstrating "not caring" attitude - Fair representation complaint upheld

CRAIG, TANYA; RE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 203, AND CONSUMERS GLASS (Jan.)

16

Unfair Labour Practice - Discharge - Duty of Fair Representation - Remedies - Union acknowledging that it violated its duty of fair representation in relation to the complainant's discharge grievance - Parties agreeing that grievance be submitted for arbitration and that Board remained seized on issue of union's liability for damages which may be awarded - Board directing that union and complainant jointly select counsel and that company, union and complainant mutually agree upon single arbitrator - Board declining to give complainant sole carriage with respect to arbitration

BRUCE REILLY; RE THE U.S.W.A.; RE GSW INC..... (July)

820

Unfair Labour Practice - Discharge - Intimidation and Coercion - Board finding employer in violation of the *Act* in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communications about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations

SOBEYS INC.; RE U.F.C.W., LOCAL 1000A..... (Sept.)

1020

Unfair Labour Practice - Discharge - Intimidation and Coercion - Judicial Review - Board finding employer in violation of the *Act* in respect of severity of penalty imposed on one employee for releasing confidential information regarding employee names and telephone numbers, the exclusion of another employee from working in the office, and in respect of communi-

cations about unions in meetings with employees - Board dismissing complaint in relation to other discipline and hiring practices and meetings at two other employer locations - Employer applying for judicial review of Board's decision and seeking interim relief - Divisional Court staying Board's decision

SOBEYS INC.; RE UFCW, LOCAL 1000A..... (Dec.) 1237

Unfair Labour Practice - Duty of Fair Referral - Duty of Fair Representation - Remedies - Complainant alleging that union violated the *Act* in removing him from his position in March 1991 and in the processes followed by the union thereafter - Union conceding that complainant had right to take his case concerning his removal to general membership for final decision - Board determining that union acted in arbitrary manner in refusing to allow complainant to present his request to remain in his position to membership for a vote - Board directing union to allow complainant to place his case before membership for its decision - Union also directed to notify all members in advance that the issue is to go before membership, to post Board's decision in the union's office and to provide copies to those members requesting it

PETER GALIATSOS; RE I.A.T.S.E., LOCAL 173; RE FAMOUS PLAYERS INC. (June) 714

Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Union filing lengthy reply to employee's complaint and asking that it be dismissed without a hearing on a number of grounds - Complainant directed to respond to union's reply and to address certain concerns raised in complaint within 30 days

EUGENE DESEIRE SOLOMON; RE R.W.D.S.U..... (May) 639

Unfair Labour Practice - Duty of Fair Representation - Union grieving permanent lay-off of 52 employees - Some employees signing release in order to receive immediate severance pay and, consequently, withdrawing their claims under grievance procedure - Union subsequently settling grievance, securing monetary compensation on top of severance pay - Whether union violated *Act* when it failed to tell employees before they signed releases that a few days later there would or might be a settlement giving remaining grievors more monetary compensation - Complaint dismissed

FORMER RNA'S OF MOUNT SINAI HOSPITAL, THE; RE S.E.I.U., LOCAL 204 (June) 708

Unfair Labour Practice - Duty to Bargain in Good Faith - Lock-Out - Remedies - Employer agreeing to voluntarily recognize union at new location so long as union prepared to enter into separate collective agreement for that location - Union rejecting employer position and filing complaint at Board - Board finding and declaring that existing collective agreement encompassing new location and that staffing and subsequent operation of new location governed by collective agreement - Board directing that any continuing dispute regarding application of agreement be determined through arbitration and directing parties to waive time limits - Board also finding that employer breached its duty to bargain in good faith in preceding round of negotiations by passing on incomplete and misleading information regarding relocation of employer operations

UNION CARBIDE CANADA LIMITED; RE ENERGY AND CHEMICAL WORKERS UNION, LOCAL 593..... (May) 645

Unfair Labour Practice - Practice and Procedure - Board directing pre-hearing filing of respondent employer's reply to union's unfair labour practice complaint, as well as disclosure of documents - Union directed to fully particularize complaint and to supply employer with documents upon which it intends to rely - Both parties directed to indicate number of wit-

nesses to be called and estimated number of hearing days required - Board directing pre-hearing conference with parties and counsel

TOWNSHIP OF LAKE OF BAYS; RE GRAHAM JOHNSON, O.P.S.E.U.(Aug.) 970

Unfair Labour Practice - Remedies - Sale of a Business - Nursing home's nurses represented by ONA - Metro Toronto's employees represented by CUPE in all-employee unit - Metro Toronto purchasing nursing home - Board observing that in two-union intermingling situations, it may give less weight to pre-existing status quo and employee preferences, and exhibit more concern about problems of fragmentation and establishment of sensible bargaining arrangements in new business context - Board declining to preserve nurses' bargaining unit at nursing home and declaring that CUPE represents the nursing home's employees, including the former ONA nurses - Board remaining seized with respect to effective date of declaration - Board dismissing unfair labour practice complaint based on failure of employer to treat new hires and transferees as coming under the ONA collective agreement

MUNICIPALITY OF METROPOLITAN TORONTO, THE; RE O.N.A. AND S.E.I.U., LOCAL 204; RE C.U.P.E., LOCAL 79(Mar.) 315

Unfair Labour practice - Settlement - Complainant filing identical complaint to one filed almost one year earlier - Earlier complaint withdrawn in circumstances which respondents submitted amounted to settlement - Board determining that earlier complaint had been settled and, accordingly, dismissing subsequent complaint

H. JOHN BARNES; RE L.I.U.N.A., LOCAL 527, AND BERNARDINO CARROZZI (June) 668

Union seeking "all-employee" bargaining unit - Bargaining Unit - Certification - Employer and objecting employees taking position that "office and clerical staff" should be treated as separate bargaining unit - Board applying *Hospital For Sick Children* test - Board finding that employees in unit sought sharing sufficiently coherent community of interest that they should be able to bargain together on a viable basis - Board determining that "all-employee" unit appropriate

MOTOR COACH INDUSTRIES LIMITED C.O.B. AS M.C.I. SERVICE PARTS COMPANY; RE C.B.R.T. & G.W.; RE GROUP OF EMPLOYEES (June) 744

Union Successor Status - Constitutional Law - Construction Industry - Charter of Rights - Judicial Review - Two locals of same union merged - Officers and members of one local opposed - Merger in compliance with union constitution - Constitution not requiring membership approval - Board issuing declaration of successor status - Divisional Court upholding Board decision - Failure to hold vote not infringing Charter right to freedom of association - Board operated within limits of statutory discretion in making successor declaration - Leave to appeal from order of Divisional Court denied by Court of Appeal

I.B.E.W., LOCAL 586 AND THE OLRB; RE I.B.E.W., LOCAL 594, PATRICK WYSE AND MAURICE WALSH(July) 889

Voluntary Recognition - Bargaining Unit - Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Employer seeking recognition clause different from one found in voluntary recognition agreement - Board finding that parties had bargained to impasse and that employer's insistence on pressing its position on bargaining unit constituting bargaining in bad faith - Board making cease and desist direction, but declining to order payment of damages

WELLINGTON COUNTY SEPARATE SCHOOL BOARD, THE; RE WELLINGTON SEPARATE SUPPORT STAFF ASSOCIATION (Oct.) 1128

Voluntary Recognition - Certification - Pre-Hearing Vote - Union advising Board that outstanding representational issues resolved on basis of executed and ratified voluntary recognition

agreement - Union seeking leave to withdraw certification application - Individual employee asking Board to address issues raised earlier in proceeding - Application dismissed

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E. - C.L.C., ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE THE COALITION TO STOP CERTIFICATION OF THE SOCIETY ON BEHALF OF CERTAIN EMPLOYEES..... (Apr.)

495

Voluntary Recognition - Collective Agreement - Construction Industry - Employer Support - Related Employer - Remedies - Board rejecting respondent's submission that voluntary recognition agreement not valid because it did not intend to use electricians supplied by union and because of alleged employer support - Although one respondent performing work exclusively in ICI sector while the other respondents performing work almost exclusively in the residential sector, Board finding respondents engaged in related business activities - Declaration issuing but limited to commercial activities or contracts entered into after the receipt of the related employer application - Board declining to declare that respondents bound to union's low-rise residential agreement

WESTVIEW ELECTRIC CONTRACTORS, RUDY CHIEFARI C.O.B. AS, T. EDISON ELECTRICAL ENTERPRISES INC., AND WESTVIEW ELECTRIC CONTRACTORS INC.; RE I.B.E.W., LOCAL 353..... (Feb.)

262

Witness - Adjournment - Discharge - Health and Safety - Remedies - Employer seeking adjournment of four continuation hearing dates on the ground that he could not afford to bring witnesses away from work to the hearing and because he had several important meetings to attend to - Board denying adjournment request, employer departing and hearing continuing in absence of employer - On the basis of the evidence before it, Board satisfied that complainant discharged, at least in part, because he gave evidence in an earlier Board proceeding involving his employer and an other employee, in violation of section 50(1) of the *Occupational Health and Safety Act* - Complaint upheld, damages quantified and awarded, and employer directed to post Board's decision in the workplace

WHITLER INDUSTRIES LIMITED; RE ROGER KENNEDY..... (Aug.)

977

Witness - Certification - Charges - Evidence - Membership Evidence - Witness in non-pay inquiry testifying that she paid \$1 when applying for union membership - Witness acknowledging in cross-examination that she had made previous inconsistent statements - Board declining to accept witness' prior inconsistent statements as evidence of the truth of their contents - Board having no affirmative evidence that witness did not pay a dollar in regard to her application - Non-pay allegation dismissed

CAMARO ENTERPRISES LIMITED; RE IUOE, LOCAL 793; RE GROUP OF EMPLOYEES..... (July)

772

Witness - Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Employee discharged after discussing petition for lunchroom with another employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness beached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD AND; RE STEVE SZEGHALMI..... (Mar.)

408

Witness - Discharge - Evidence - Health and Safety - Judicial Review - Natural Justice - Practice and Procedure - Employee discharged after discussing petition for lunchroom with another

employee - Board permitting complainant to recall employer's witness, but limiting evidence to be led through that witness - Board unwilling to exercise discretion under section 24(7) of the *Occupational Health and Safety Act* to modify penalty - Complaint dismissed - Complainant applying for judicial review on grounds that limiting evidence from recalled witness breached rules of natural justice and that Board's interpretation of section 24(7) patently unreasonable - Judicial review application dismissed by Divisional Court - Court of Appeal denying application for leave to appeal

NATIONAL PLASTIC PROFILES INC., ONTARIO LABOUR RELATIONS BOARD
AND; RE STEVE SZEGHALMI..... (Sept.)

1058

Witness - Evidence - Practice and Procedure - Sale of a Business - Board not persuaded that statutory duty under sub-section 64(13) satisfied through production by only one of the respondents of a witness to testify with respect to the allegation that a sale occurred - Second respondent directed to adduce, through *viva voce* testimony at the hearing, "all facts within their knowledge that are material to the allegation"

STEINBERG INC. (MIRACLE FOOD MART DIVISION) AND THE GREAT
ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE TEAMSTERS'
UNION, LOCAL 419; RE R.W.D.S.U., AFL CIO CLC AND ITS LOCAL 414..... (Feb.)

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